

EXHIBIT B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a)
Washington corporation,)
Plaintiff,)
vs.) No. 2-10-cv-01823-JLR
MOTOROLA, INC., and MOTOROLA)
MOBILITY, INC.,)
Defendants.)

VIDEOTAPED DEPOSITION OF TODD D. MENENBERG
June 20, 2013
Seattle, Washington

Job No. CS1685790

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1 Q Did he explain to you what the project was?

2 A Yes, he gave me an overview of the project.

3 Q And what was your understanding following that call of
4 what the project was?

5 A I think it was fairly a high-level overview, and it
6 general was about the two areas that we've talked about:
7 quantifying the legal fees and the relocation expenses.

8 I'm not sure that was mentioned in the first
9 meeting, the relocation expenses. I just don't recall.

10 Q Okay. How many communications did you have with
11 Mr. Cramer or anyone else from Mr. Harrigan's firm prior
12 to being formally retained on the case?

13 A I don't remember, but it wouldn't have been many.

14 Probably a couple.

15 Q When did you actually begin work on the case?

16 A As I recall, it was early April 2013.

17 Q And when you began work on the case, what was your
18 understanding of what you were retained to do?

19 A Well, at that point I met with Mr. Cramer as well as
20 Chris Wion, and the scope was delineated in more detail,
21 and it was, as we've talked about, to first quantify the
22 legal cost-- I should say accumulate and compile the
23 legal costs related to the litigation we are talking
24 about, and then second, to compile the cost relative to
25 the relocation of the distribution center from Germany to

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1 The Netherlands.

2 Q I just want to make sure I heard you correctly.

3 You stated that you were retained to accumulate and
4 compile the legal costs associated with the litigations
5 at issue here and compile the costs relative to the
6 relocation of the distribution center from Germany to The
7 Netherlands.

8 Is that correct?

9 A Yeah, and I mentioned and described this in the second
10 paragraph on Page 4 of my report, which explains in a
11 little more detail.

12 In terms of the first one, it was to quantify the
13 legal costs, including attorney fees and other litigation
14 costs and expenses incurred by Microsoft and that
15 Microsoft contends were incurred as a consequence for
16 Motorola's breach of contract.

17 Then second, to quantify the costs incurred by
18 Microsoft in connection with the relocation of the
19 distribution center from EMEA, which is European, Middle
20 Eastern, and African market, from the German location to
21 The Netherlands, 2012, as well as the increased cost from
22 operating the distribution center in The Netherlands as
23 compared to Germany.

24 Q Were you asked to analyze any other issues in the
25 litigation that didn't end up in your report?

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1 which consists of at least [REDACTED] in legal cost
2 damages and [REDACTED] in facility relocation and
3 operating cost damages.

4 Q And when you referred a moment ago to the various other
5 opinions on-- throughout your report, were you referring
6 to the sort of subtotals on different categories that
7 added up to the [REDACTED] amount that you
8 just referenced?

9 A Well, certainly those are additional areas that I've had
10 opinions on, but I suspect if you ask me on almost every
11 item, I might have an opinion about it.

12 It depends the-- how granule you want to get to the
13 opinions.

14 Q Okay. We'll get to that then, but at a high level, the
15 opinions you intend to offer are the total amount of
16 damages allegedly incurred by Microsoft and then the
17 breakdown of that total amount into the legal cost
18 damages and the facility relocation and operating cost
19 damages, correct?

20 A That's correct.

21 Q Now, I would like to start first with the total legal
22 costs that you reached.

23 What is the basis for that total, at a high level?

24 A Well, at a high level that represented the amounts
25 incurred and paid by Microsoft to the respective

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1 different firms, and there were five different firms, and
2 those are itemized on Page 7.

3 These are the total litigation costs and expenses
4 incurred by Microsoft and that Microsoft contends were
5 incurred as a consequence of Motorola's breach of
6 contract.

7 Q And in terms of what you actually base these numbers on,
8 what did you rely upon?

9 A Well, these were based on invoices submitted to Microsoft
10 or in some instances Microsoft has a legal reporting
11 system that also prints out the same information from
12 their financial accounting system. In some cases we
13 relied on that as well.

14 Q So referring to the calculations on Page 7, the table at
15 the top of Page 7, is it correct-- Page 7 of your report.

16 A I'm here.

17 Q Is it correct that the documents that you relied on for
18 those calculations were the invoices from the various
19 firms or Microsoft's internal accounting system
20 reflecting those amounts and not any other documents?

21 A Let me just check because the back-- I believe that's
22 correct, but I want to just take a second.

23 Yes, those would have been the foundational
24 documents which I used to compile these numbers.

25 Q Okay. Now, in terms of the total amount of costs-- let

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1 "Let me explain the history."

2 We just talked as a general group, and he had, as I
3 recall, a pretty good knowledge of some of information
4 there, and he talked about some of those things, but I
5 don't recall specifically what he said.

6 Q Now, Page 4 of your report also says you spoke with
7 Ms. Muldoon?

8 A I did.

9 Q And she is the finance analyst-- she's finance analysis
10 and controls, IE, EOC, and financial controls at
11 Microsoft?

12 A Yes.

13 Q And she's based in Ireland; is that right?

14 A That's correct.

15 Q So how many conversations did you have with Ms. Muldoon?

16 A I think we had at least three, maybe four.

17 Q And were any in-person?

18 A No.

19 Q And tell me everything you can remember about your
20 conversations with Ms. Muldoon.

21 A Those were fairly detailed.

22 We would get into specifics on the various items
23 related to the relocation and the increased operating
24 costs from the move from Germany to The Netherlands, and
25 we talked in a general sense conceptually, but then we

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1 would also get into specific invoices, and we would have
2 questions with her.

3 Where there were gaps or we felt like we needed
4 additional documentation, we would request that of her,
5 and she would research and come back and maybe e-mail
6 things to counsel who would send them to us, and then we
7 would have follow-up phone calls to further discuss those
8 new documents.

9 Q When did you first interview Ms. Muldoon?

10 A I don't recall the exact date, probably sometime mid to
11 late May, I would guess.

12 Q And then you had subsequent calls after that?

13 A Well, I didn't have any subsequent calls after my report.

14 Q Okay. So let me rephrase.

15 I think you said that you had maybe two to three
16 conversations--

17 A Three to four calls, as I recall.

18 Q Okay.

19 A At least three.

20 I am thinking maybe a fourth, a very short one.

21 Q I'm just trying to get a sense of when those occurred.

22 I understand your report was served on May 29th--

23 A Yes, and I would estimate they occurred in the two to
24 three weeks before that.

25 Q Okay. And did your conversations with Ms. Muldoon affect

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1 the opinions that you're offering in this case?

2 A They did.

3 Q And how so?

4 A Well, they helped, one-- they helped me locate specific
5 documentation, contemporaneous documents that help
6 support some of the numbers, and she was very helpful
7 there.

8 Two, she was very familiar with the nature of this
9 move and some of these costs, was able to explain some of
10 the background behind just the invoice so I understood a
11 little bit more of what had happened.

12 Q So when you say that Ms. Muldoon helped locate documents
13 that you reviewed in connection with your report, was she
14 helping locate documents that Microsoft had already
15 produced in the litigation or additional documents that
16 you needed to fill in the gaps in your report?

17 A I think both because some of the documents we had that
18 had been produced to us were helpful, but as I recall,
19 there were gaps, and we wanted additional documents, and
20 we had to call up her, and I would explain, "Well, you
21 must have X, Y, and Z," and for the most part, with a
22 couple of exceptions that I mentioned earlier, they were
23 able to find those documents and send those along to us.

24 Q Do you recall whether your conversations with Ms. Muldoon
25 were before or after May 9th?

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1 A I don't know for sure.

2 Q Do you recall whether you had reviewed Mr. Davidson's
3 deposition transcript before having your conversations
4 with Ms. Muldoon?

5 A I can't say for sure.

6 I don't know.

7 Q But certainly in the course of your work with respect to
8 formulating an opinion on the relocation costs, there
9 were certain documents that you felt that you needed that
10 you discussed with Ms. Muldoon, and she supplied them to
11 you, either directly or via counsel?

12 A There were additional documents that I thought would
13 buttress our work and my opinions.

14 Were they absolutely necessary? You'd have to go to
15 each document.

16 I don't know, but I wanted to get as much
17 corroborating evidence as I could, and I would ask that
18 of her.

19 In some cases she was able to give me all that I
20 asked. In other cases she was still looking.

21 As we sit here today, I don't have every possible
22 document, but I have enough where I'm comfortable with
23 the opinions that I gave.

24 Q Did Ms. Muldoon explain to you, for example, you know,
25 spreadsheets that Microsoft produced in this case, what

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1 the numbers in the spreadsheets mean and--

2 A She did.

3 Q Okay. And is that information that you were able to get
4 from any source other than Ms. Muldoon?

5 A I may have been able to. I didn't seek it because I got
6 the documents-- I read through them, and in most cases
7 thought I understood them, but again, I would prefer, in
8 these situations, to talk to somebody that's more
9 familiar with the creation of documents, and she was
10 intimately familiar with a number of those sheets, so she
11 helped me understand them.

12 It was just the most sufficient way to understand
13 what the numbers reflected.

14 Q Right.

15 On Page 6 of your report you reference discussions
16 with counsel.

17 Are there particular discussions that you are
18 referencing here or is that a more general statement?

19 A I am just looking, what specific statement are you--

20 Q Right underneath the heading, "III."

21 A Well, the discussions with counsel helped me understand
22 what was being provided to me.

23 These were invoices incurred-- reflecting legal
24 bills that Microsoft paid relative to this litigation,
25 and they should be considered as part of the damage

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1 A That's correct.

2 Q So if I could turn your attention to Pages 9 through 11
3 of your report--

4 A Okay.

5 Q And there's a series of Steps 1 through 8 listed there?

6 A Yes.

7 Q Did that accurately describe how you calculated the
8 amount of attorney fees and costs that Microsoft incurred
9 by work from the Sidley law firm?

10 A I believe it does.

11 Q Okay. Focusing first on Step 1, is it correct that that
12 is the creation of an Excel spreadsheet?

13 A Yes.

14 Q And then Steps 2, 3, and 4, did those steps entail data
15 entry?

16 A They did.

17 Q So you or members of your team reviewed information in
18 the Sidley invoices and inputted that data into your
19 spreadsheet, correct?

20 A That's correct.

21 Q And is the same true with respect to Steps 6 and 7, those
22 are data entry steps?

23 A That's correct.

24 Q And did all of the information used in Steps 2 through 4
25 and 6 and 7 come from the Sidley invoices themselves,

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1 including the highlighted version of those invoices?

2 A I believe that's correct.

3 I'm just looking to see if any of that came from the
4 Microsoft 360--

5 Q Okay.

6 A But I don't believe it did.

7 I believe those all came from Sidley invoices
8 themselves, as I recall.

9 Q And did your team-- did you and your team enter the data
10 into your Excel spreadsheet exactly as it appeared in the
11 highlighted invoices? In other words, were any changes
12 made?

13 A I don't believe we made any changes.

14 I do have a recollection we had some questions on
15 some entries that might have resulted in some
16 corrections, but then we put in the correct information,
17 but they were minimal, if any, but there were some
18 questions we had, but as I recall, whatever was given to
19 us was clarified, and we entered the correct number.

20 Q And do you recall-- well, do you recall with any more
21 specificity these instances where you had questions?

22 A I don't.

23 They were really minor.

24 They weren't significant.

25 Q When you had questions, did you ask those questions to

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1 Q On Page 10 there's a reference to Step 5 and that there's
2 a calculation that was performed in Step 5.

3 Is that correct?

4 A Yes.

5 Q It says that the hours in Steps 2C and 2D were
6 multiplied, but I don't see-- I'm not seeing what 2C and
7 2D are.

8 Can you clarify that?

9 A Well, it appears what happened in the draft of the
10 report, those step numbers didn't get updated, but what
11 that reflects at Step 5 is the hours, which go back to
12 Step 4, and then the respective rate, which was also
13 entered.

14 I just don't see exactly where it's itemized the
15 steps, but that's also in the database as well.

16 Q Okay. And the calculation performed in Step 5, was that
17 performed by the Excel program?

18 A Yes.

19 Q Step 8 also refers to a calculation.

20 Was that calculation also performed by Excel?

21 A Yes.

22 Q In calculating the amount of fees and costs that
23 Microsoft allegedly incurred from the Sidley Austin law
24 firm, what analysis of your own did you do of those costs
25 and fees?

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1 few different ways.

2 Q I guess what I'm trying to get at is-- it appears from
3 your report that your team took the highlighted Sidley
4 invoices, input the information that was in those
5 invoices, and calculated totals based on what the
6 calculations in the Excel program-- I just want to make
7 sure there wasn't any additional analysis that you or
8 your team did with respect to changing data entries or
9 anything else or if it's purely entering the information
10 from the Sidley invoices into a database and coming up
11 with calculations from there.

12 A I think that's largely accurate what you said.

13 Q Okay.

14 A With the-- other than the points I've just talked about,
15 I think that's largely accurate.

16 Q Okay. Now, can you explain for me what you understand
17 the methodology was that was used to determine what work
18 was performed by Sidley as a result of Motorola's alleged
19 breach of contract?

20 THE WITNESS: I'm sorry, may I have
21 that question read back?

22 (Question on Page 57, Line 16-
23 19 read by the reporter.)

24
25 THE WITNESS: Well, based on my

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1 discussion with Ms. Robbins, in an overview sense, I
2 think there's-- I understood that she, who was very
3 familiar with the work done and the people who did the
4 work, reviewed the bills and first looked to see were
5 there areas where the nature of the work was clearly 100
6 percent related to this project.

7 Second, she might identify clear areas that were not
8 related to this work, and she would eliminate those in
9 consideration.

10 Then there were a number of areas that was something
11 more than zero but less than 100 percent, and she looked
12 into it in more detail subjectively, because she had the
13 knowledge, and said, "Well, what would make most sense,"
14 and where she had more knowledge and information, she
15 might ascribe a certain percentage.

16 In many cases that calculation may be based on the
17 number of patents that were still at play, and she can
18 just apportion the methodology that I think was talked
19 about in Mr. Killough's deposition.

20 The nature of her work, she spent, as I understand,
21 a substantial amount of time going through, in some
22 detail, analyzing each of the entries, and being familiar
23 with the work that was done by those people, she would
24 come up with the right percentage.

25 Where the description was applicable over a group of

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1 patents, the number of patents in play relative to the
2 total formed the percentage.

3 As various patents-- that number got down-- was
4 reduced, the percentage sometimes came down from maybe 80
5 percent to 66 percent, depending on how many patents were
6 at play when that particular legal task was done.

7 That's my general understanding of what she did.

8 Q (By Ms. Roberts) And she did that on an individual
9 task-by-task basis, right?

10 A Yes.

11 Q Not for overall totals on an invoice dated for a certain
12 month, right?

13 A That's correct.

14 Q And do you know who came up with that methodology?

15 A My understanding is that was done at the direction of
16 Microsoft, through discussion-- I don't know specifically
17 if it was unilaterally done or it was based on
18 collaborative effort, but I understand she was working
19 under the direction of Microsoft in developing that and
20 implementing that methodology.

21 Q You didn't develop the methodology?

22 A I did not.

23 Q Were you part of any of the discussions as to whether to
24 use that methodology?

25 A I was not.

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1 Q Do you recall when you were informed that that
2 methodology was going to be used?

3 A I don't recall when I was first informed.

4 I recall reading about it in David Killough's
5 deposition, and I certainly talked about it with counsel,
6 but I don't remember when.

7 Q Do you recall if you knew that that was the methodology
8 being used before you read about it in David Killough's
9 deposition?

10 A I don't remember when I specifically had these
11 discussions or when I learned specifically when it was
12 done.

13 I just don't remember when.

14 Q And are you aware of any cases or articles saying that
15 the methodology Ms. Robbins used in allocating
16 percentages of tasks to Motorola's alleged infringement
17 is an appropriate way to approach a project like this?

18 A I'm not aware of any articles or-- that specifically
19 direct someone how to do that.

20 I am aware of what she did.

21 In light of what we were trying to do, what they
22 were setting out to do, in terms of ascribing what
23 elements of the specific legal work related to these
24 patents, it seemed to me to be a reasonable way to do it.

25 Q And do you intend to offer an opinion that the

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1 methodology was reasonable?

2 A I think in light of the information that was available at
3 this time, the methodology was reasonable, yes.

4 Q When you say "in light of the information that was
5 available," what are you referring to?

6 A Well, we have all the invoices, and the task at hand was
7 to try to develop how much of those specific legal hours
8 and related expenses were related to these patents in
9 question.

10 It seems to me Ms. Robbins is very familiar with the
11 project. I know that from talking with her, and I
12 understand that to be the case as well.

13 It seemed to me that was a reasonable approach to
14 try to figure out how much of those total costs was
15 relevant for purposes of developing the amount claimable.

16 Q Is there somewhere in your report where you state that
17 you intend to opine that the methodology was reasonable?

18 A I don't state that in the report, but you asked my
19 opinion whether I think it's reasonable.

20 I think it's a reasonable approach.

21 Q Do you intend to offer that opinion at trial?

22 A If I'm asked by you if I think it's reasonable, or by
23 counsel, I will answer it honestly.

24 I think it's reasonable.

25 I'm not sure if that's intended by counsel for me to

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1 address that, but if it comes up, I will give my opinion.

2 Q Is it correct that neither you nor anyone on your team
3 actually went through the Sidley invoices and determined
4 the allocation percentages that should be given to any
5 particular task?

6 A That's correct.

7 Q That was solely done by Ms. Robbins at Sidley Austin,
8 correct?

9 A That's correct.

10 Q Now, do you understand that the reason why Ms. Robbins
11 needed to perform these allocations is that for nearly
12 two years all Microsoft versus Motorola and Motorola
13 versus Microsoft litigation was input by Sidley into one
14 matter and invoiced as one matter to Microsoft?

15 A I think that's generally correct.

16 Q Okay. So there weren't separate invoices for an almost
17 two-year period for the various different litigations
18 between the two parties?

19 A That's correct.

20 Q And are you aware that Mr. Killough stated there were--
21 there are close to 50 litigations between Microsoft and
22 Motorola?

23 A I don't recall the exact number.

24 I remember he talked about there were a lot.

25 I don't remember the exact number as I sit here.

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1 Q Okay. What, if anything, did you do to familiarize
2 yourself with the various litigations between Microsoft
3 and Motorola that are reflected in the invoices that your
4 team relied on?

5 A Primarily read the pleadings, some of the pleadings, the
6 initial complaint, I believe I read the answer, I read
7 some of the interrogatories, and I read the judge's
8 decision as well.

9 Q And when you say you read some of the pleadings, and you
10 reference the complaint and the answer, you're referring
11 to the pleadings in this case, correct?

12 A Yes.

13 Q Okay. The list of materials considered in your report
14 doesn't list any legal pleadings from any other cases, so
15 I just wanted to confirm that you did not review any of
16 those pleadings.

17 A I did not.

18 Q What is your understanding of the particular litigations
19 between Microsoft and Motorola that Microsoft is seeking
20 to recover attorney fees for?

21 A Well, my understanding is reflected somewhat in my
22 report, but generally, and this is an oversimplification,
23 I understand there is a dispute about the nature of the
24 royalty rates that were trying to be negotiated between
25 the parties -- Was it a reasonable amount that Motorola

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1 A No, I didn't get into that detail.

2 It wasn't really necessary for what I was setting
3 out to do.

4 Q And you didn't discuss that type of detail with counsel?

5 A I certainly didn't get into specific pleadings in the
6 other cases with counsel, no.

7 Q So is it fair to say that with the exception of the
8 example on Page 10 of your report, referring to the ITC,
9 you don't know the number of patents at issue in each of
10 the various litigations that Microsoft is seeking to
11 recover attorney fees and costs from, correct?

12 A I don't, as I sit here.

13 It might be in my files. I just don't know as I sit
14 here.

15 Q Now, we discussed the reason why Ms. Robbins needed to go
16 through Sidley's invoices and allocate on an individual
17 task basis, but the percentage attributable to the
18 litigations that Microsoft is seeking to recover fees and
19 costs for is because for a two-year period, or close to
20 two-year period, all of the litigation between the two
21 parties was included in one invoice to Microsoft, right?

22 A I believe that's correct.

23 Q Okay. So do you understand that in that-- we'll call
24 it--

25 A Let's clarify, one invoice each month.

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1 Q Exactly, okay.

2 A Okay.

3 Q Yeah, so-- I'm going to refer to that one invoice as the
4 master bill, okay?

5 A Okay.

6 Q So included in that master bill, you understand, was work
7 on the ITC 744 investigation that Microsoft filed against
8 Motorola?

9 A You know, I would have to look at specific invoices.

10 I don't have anything to dispute, but I don't know
11 affirmatively, as I sit here, if that's correct.

12 Q And so you don't know-- well, are you familiar with the
13 ITC 744 investigation at all?

14 A I don't recall what that is, as I sit here.

15 Q Do you understand that Microsoft filed a lawsuit in--
16 before the ITC against Motorola inserting infringement of
17 Microsoft patents?

18 A I have a general recollection that's correct.

19 Q And you understand that Microsoft is not seeking to
20 recover attorney fees and costs associated with work done
21 on that matter?

22 A I think that's correct.

23 Q Okay. And do you understand that included in this master
24 bill was work done on Case No. 1577 in the Western
25 District of Washington, which is a case that-- a patent

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1 infringement case that Microsoft filed against Motorola
2 prior to filing the present lawsuit?

3 A I'm not familiar with that.

4 Q But you have no reason to disagree then?

5 A I do not.

6 Q Are you familiar with a case between the two parties in
7 the Southern District of Florida that also was included
8 in this master bill?

9 A I am not familiar.

10 It might be in our files, but I'm not familiar, as I
11 sit here.

12 Q And so if I told you that Motorola was asserting patents
13 in that case that are not standard essential patents, you
14 wouldn't agree or disagree?

15 A I have no basis to comment.

16 Q You wouldn't know-- okay.

17 Do you know when Ms. Robbins performed all of the
18 allegations in the highlighted Sidley invoices that you
19 and your team relied on?

20 A I don't know exactly when.

21 I believe relatively recently, but I don't know
22 exactly when.

23 Q I believe Mr. Killough testified that they were done by
24 her this spring.

25 Do you have any reason to disagree with that?

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1 A That seems to be, as I recall, something around that.

2 Q Okay. And do you recall that some of the Sidley invoices
3 that your team relied on date back to October, November
4 of 2010?

5 A I think that's correct.

6 Q Would you agree that there would have been less chance
7 for error in making allocations if the allocations were
8 being done closer in time to when the work was being
9 done?

10 A Ideally that would have been better, but for whatever
11 reason that wasn't done, so this was the best they could
12 do at this time frame-- at this time.

13 Q Okay. Now, you're not offering an opinion on causation;
14 is that correct?

15 A Causation as it relates to legal fees?

16 Q Right.

17 A I am not.

18 Q So you're relying on Sidley's allocations in its invoices
19 as to which fees and costs were incurred as a result of
20 Motorola's alleged breach of contract.

21 You don't have any opinions yourself on the
22 percentages that should be in those allocations, correct?

23 A That's correct.

24 Q Now, did you do anything to check or confirm that the
25 allocations made by Ms. Robbins in the Sidley invoices

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1 were done correctly?

2 A I accepted those allocations as given to me.

3 Q Did you or your team review the time entries and ask any
4 questions noting, "There's a reference to the 744 case
5 here. Is this allocation correct?"

6 Anything like that?

7 A I would be surprised if we did that.

8 Q Okay.

9 A It's possible a member of my team did, but I don't think
10 we got to that detail.

11 Q Okay. So basically you and your team accepted the
12 highlighted invoices as they were provided to you by
13 Sidley Austin, correct?

14 A That's correct.

15 Q Okay. So if it turns out that there are errors in
16 Sidley's allocations, that would mean that the totals in
17 your report are incorrect, correct?

18 A Yes.

19 (Exhibit No. 1 marked for
20 identification.)

21

22 Q (By Ms. Roberts) Okay. I am going to hand you what we
23 will mark as Menenberg Exhibit No. 1, which has the Bates
24 No. MS-MOTO_1823_0006003814A.

25 A Thank you.

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1 work on a case that does not involve Motorola SEPs, how
2 the 40 percent allocation was made?

3 A Well, I don't know if, in fact, that's correct.

4 I didn't make that highlighting. I don't know.

5 Q Okay. If I could turn your attention to the page ending
6 in 850A--

7 A Okay.

8 Q And you'll see there's several entries that have a yellow
9 highlighting, which is the 80 percent allocation,
10 correct?

11 A I see that.

12 Q And there's one that doesn't have any highlighting, which
13 indicates 100 percent; is that right?

14 A I do see that.

15 Q And sitting here today, you can't explain why it was
16 determined that 100 percent of that task was
17 attributable, allegedly, to Motorola's alleged
18 infringement-- alleged breach of contract?

19 A I cannot.

20 (Exhibit No. 2 marked for
21 identification.)
22

23 Q (By Ms. Roberts) I am going to hand you what we will
24 mark as Menenberg Exhibit No. 2, which bears the Bates
25 No. MS-MOTO_1823_0006003905A.

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1 A Thank you.

2 Q If I could turn your attention to the page ending in
3 909A-- well, before we do that, does this appear to be a
4 highlighted Sidley invoice, dated May 31st, 2011?

5 A Yes, it does.

6 Q So now if I could turn your attention to the page ending
7 in 909A--

8 A Okay.

9 Q And there's a time entry dated 4/22/11 for DI Lewis.

10 A I see that.

11 Q That's highlighted in orange, I believe.

12 A Well, you know, it looks more yellow to me, but maybe the
13 original was orange, and I'll accept that.

14 Q There's a reference to FAT patents in this time entry.

15 A I see that.

16 Q Do you know which case the FAT patents were at issue in?

17 A I do not.

18 Q So if I told you that those are patents that were
19 asserted by Microsoft against Motorola, you wouldn't be
20 in a position to agree or disagree?

21 A That's correct.

22 Q And so you can't explain how the particular allocation
23 percentage was totalled for this particular time entry?

24 A I cannot.

25 /////

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1 (Exhibit No. 3 marked for
2 identification.)
3

4 Q (By Ms. Roberts) I am going to hand you what we will
5 mark as Menenberg Exhibit No. 3, which has the Bates
6 No. MS-MOTO_1823_0006001488B.

7 A All right.

8 Q Does this appear to be a highlighted Sidley invoice,
9 dated June 19, 2012?

10 A It does, yes.

11 Q If I could turn your attention to the page ending in
12 489B--

13 A Okay. I'm with you.

14 Q There's an entry there for coordinating the circulation
15 of markman filings and notice of appeal to the 9th
16 Circuit (1408 and 1823)?

17 A I see that.

18 Q Do you understand that the case with the-- Case No. 1408
19 is not one of the cases that Motorola-- that Microsoft is
20 seeking to recover fees and costs for?

21 A I don't know that.

22 Q Okay. And so you don't know how this could be 100
23 percent allocations to Motorola's alleged breach of
24 contract?

25 A I am not in position to comment on that.

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1 (Exhibit No. 4 marked for
2 identification.)
3

4 Q (By Ms. Roberts) I am going to hand you what we will
5 mark as Menenberg Exhibit No. 4, which bears the Bates
6 No. MS-MOTO_1823_0006001607B.

7 A Thank you.

8 Q Does this appear to be a highlighted Sidley invoice,
9 dated March 20th, 2012?

10 A Yes, it does.

11 Q Can I turn your attention to the page ending in 617B?

12 A Okay.

13 Q And right underneath the third redacted, there's a time
14 entry for February 15th, 2012 for HF Webley?

15 A I see that.

16 Q And in that time entry it says, "Summarizing pleadings in
17 SDFL Moto/Apple case related to claim scope of Motorola's
18 wireless sync patent."

19 Do you see that?

20 A I do.

21 Q Are you aware that the-- well, Southern District of
22 Florida, Motorola/Apple case is not one of the cases that
23 Microsoft is seeking to recover attorney fees and costs
24 for?

25 A That would make sense to me.

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1 Q Okay. And you had mentioned that your team read through
2 descriptions to see if there were any time entries that
3 didn't appear to belong on these invoices.

4 Is this one referencing a case between Motorola and
5 Apple one that your team noted?

6 A No, but to be clear, as I mentioned, it was a high-level
7 view.

8 We literally looked at thousands of entries.

9 I don't claim that we looked and scrutinized each
10 one, but having said that, you know, it also goes on to
11 say, "(Counterpart of which is asserted against Microsoft
12 in Germany)," so based on that alone, there may be a
13 valid basis to include it, so you have to read it in
14 total, I think, before making a-- rushing to judgment.

15 Q And so the reference to the wireless sync patent, the
16 counterpart of which is being asserted against Microsoft
17 in Germany, you don't know whether that's a standard
18 essential patent or a nonessential patent, right?

19 A I don't, but my point is this particular description
20 mentions Microsoft, that's all.

21 Q Okay. And so if it turns out that the wireless sync
22 patent reference here is actually a nonessential patent,
23 would you agree that percentage allocation should be zero
24 percent?

25 A I'm not in a position to say that.

1 There may be other reasons, that Ms. Robbins is
2 familiar with, that warrant leaving it exactly as it is.

5 A I don't have intimate knowledge of those arguments that
6 you're talking about.

10 Q (By Ms. Roberts) I will now hand you what we will mark
11 as Menenberg Exhibit No. 5, which bears the Bates
12 No. MS-MOTO_1823_0006002291B.

14 Q And do you agree that this appears to be a highlighted
15 Sidley invoice, dated September 20th, 2011?

17 Q If I can turn your attention to the page ending in 355B--

19 Q And there's a time entry between the third redacted,
20 dated August 10th, 2011, for A McLeod.

22 | A I don't.

24	Q	Yeah.
----	---	-------

Veritext Corporate Services

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1 the big one.

2 A Okay. Who's the person you're talking about?

3 Q A McLeod.

4 A I do see it. I'm with you.

5 Q Okay. And the time entry refers to assisting with
6 deposition preparation in the SDFL ITC 744, and ITC 752
7 cases?

8 A I see that.

9 Q Again, do you understand that the Southern District of
10 Florida ITC 744 cases are cases where Motorola SEPs are
11 not at issue?

12 A I am not familiar with that.

13 Q Okay. If that were the case, would you agree that there
14 should not be 100 percent allocation for this time entry?

15 A I'm just not in a position to opine on that.

16 I don't know.

17 Q If you could turn to the page ending in 2500B--

18 A Okay.

19 Q And there are several entries that appear to be expenses
20 for the-- preparing for and defending the deposition of
21 Matt Lynde?

22 A I see that.

23 Q Do you see that?

24 A Yes.

25 Q And in the time entries the dates provided are July 20th

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1 and July 21st, 2011?

2 A I see that.

3 (Exhibit No. 6 marked for
4 identification.)

5
6 Q (By Ms. Roberts) I am going to hand you what we will
7 mark as Menenberg Exhibit No. 6, which is a cover page of
8 the deposition of Matthew Lynde, dated Thursday, July
9 21st, 2011.

10 A Okay.

11 Q And you are familiar in your work with deposition
12 transcripts, correct?

13 A Yes.

14 Q So you've seen a document that looks like Menenberg
15 Exhibit No. 6 before, correct?

16 A Yes.

17 Q And do you see the date in the middle of the page, toward
18 the bottom, July 21st, 2011?

19 A I do see that.

20 Q Okay. And it states that it's a videotaped deposition of
21 Matthew R. Lynde?

22 A Yes.

23 Q And that is generally the same date listed in the time
24 entry we were just-- the expense entry we were just
25 looking at in Menenberg Exhibit No. 5, correct?

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1 A Yes.

2 Q Okay. If I could turn your attention on Menenberg
3 Exhibit No. 6 to the case caption at the top of the
4 page--

5 A Same page?

6 Q The same page, yeah, the very--

7 A Okay.

8 Q I'm sorry, no, in Menenberg Exhibit No. 6, the
9 deposition--

10 A Oh, I'm sorry.

11 Okay.

12 Q You understand at the top of the page that lists the case
13 that the deposition was in, correct?

14 A Yes, at the very top.

15 Q Okay. And it lists it as the Southern District of
16 Florida case?

17 A Yes.

18 Q So based on this, would you agree that it appears that
19 the deposition reflected in the invoices on Menenberg
20 Exhibit No. 5 was this deposition of Mr. Lynde in the
21 Southern District of Florida case?

22 MR. HARRIGAN: So you're referring--
23 object to the form.

24 You're referring to the entry dated August 12 or 10
25 on the invoice?

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1 MS. ROBERTS: Yes, and then the
2 description provides the dates of July 20th and July
3 21st.

4 MR. HARRIGAN: On the deposition?

5 MS. ROBERTS: No, in the invoice.

6 MR. HARRIGAN: Okay. I've gotcha.

7 THE WITNESS: Can I have the question
8 read back, please?

9 (Question on Page 79, Line 18-
10 21 read by the reporter.)
11

12 THE WITNESS: That seems reasonable.

13 I mean, there may be more facts or other information
14 I'm not aware of.

15 It seems to add up, but again, I'm not familiar with
16 this, but as you layout those items, I have no reason to
17 contest that.

18 Q (By Ms. Roberts) And so then it's fair to say you don't
19 have any reason-- any knowledge of why 100 percent of the
20 expenses in preparing for and defending the deposition of
21 Mr. Lynde on those dates were allocated to Motorola's
22 alleged breach of contract?

23 A I have no-- I'm not in a position to comment on that.

24 Q Okay. Now, I believe you testified that you and your
25 team relied, for Sidley Austin, on the highlighted

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1 Q So for the purposes of your opinions, you've assumed that
2 the entire amounts reflected in the Sidley invoices that
3 you relied upon were paid by Microsoft?

4 A Well, as I recall, we traced billed amounts to accounting
5 records from the Microsoft legal system to indicate they
6 were paid.

7 Q And those accounting records are at an invoice level,
8 correct?

9 A I just don't recall as I sit here.

10 Q Do you recall seeing any accounting records that were at
11 a task level similar to the Sidley invoices that you and
12 your team relied on?

13 A You know, we may have. I just don't remember.

14 I would have to go back to our records.

15 Q Let's turn next to the Freshfields total.

16 On Page 11 of your report, bottom of the page, you
17 state that the total amount of fees incurred, based on
18 work by the Freshfields firm, was [REDACTED].

19 Is that correct?

20 A That's correct.

21 Q And do the steps on Page 13 of your report explain how
22 you calculated the amount of attorney fees and costs
23 incurred based on work performed by the Freshfields firm?

24 A That's correct.

25 Q And is Step 1 a creation of an Excel spreadsheet?

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1 A Yes.

2 Q And Step 2, is that just simply data entry based on
3 information in the invoices?

4 A That's correct.

5 Q And did you and your team enter the data exactly as it
6 appeared in the invoices?

7 A I believe we did relative to these items, yes.

8 Q There weren't any communications with counsel about
9 changes to make for any particular entries?

10 A Not that I can recall.

11 Q And then the sum that is the total amount incurred, based
12 on work by the Freshfields firm, was that sum calculated
13 by Excel?

14 A Yes.

15 Q And so is there any analysis that you or your team
16 performed in making the calculation with respect to the
17 work performed by the Freshfields firm?

18 A Analysis in what sense?

19 Q Well, again, similar to the Sidley firm, I want to get a
20 sense of whether your team entered the data from the
21 invoices into your database and performed the
22 calculations and that's the number that appears or if
23 there was any other analysis that you and your team added
24 to the work.

25 A I think it was similar to what we just talked about in

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1 the last hour for all the different law firms.

2 MS. ROBERTS: Okay. Let's go ahead
3 and take a break to change the tape.

4 VIDEOGRAPHER: Going off the record at
5 11:05 a.m.

6 (Recess 11:05 to 11:11 a.m.)

7
8 VIDEOGRAPHER: We are back on the
9 record at 11:11 a.m.

10 This is Disc No. 2 in the deposition of Todd
11 Menenberg.

12 Q (By Ms. Roberts) Mr. Menenberg, before the break we were
13 talking about the calculation of the total amount of fees
14 and costs allegedly incurred from-- based on work by the
15 Freshfields firm?

16 A Yes.

17 Q Is it correct that there weren't any allocations
18 performed similar to those done with the Sidley invoices
19 for the Freshfields firm?

20 A That's correct.

21 Q And is that correct, actually, for the other law firm?
22 Sidley is the only one where allocations were performed?

23 A That's correct.

24 Q The next law firm that you looked at was Boehmert &
25 Boehmert?

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1 A Yes.

2 Q And you opined that the total amount of fees and costs
3 incurred, based on work performed by the Boehmert firm,
4 was [REDACTED]?

5 A That's correct.

6 Q And in calculating that total, did you use the same steps
7 reflected on Page 13 with respect to the Freshfields
8 firm?

9 A Well, if you read at Page 15, it talks about that we did
10 the same first two work steps as described for
11 Freshfields.

12 Q Okay. And so is it correct that with respect to the
13 Boehmert firm, you and your team similarly input the data
14 in invoices into an Excel spreadsheet and then calculated
15 the total?

16 Is that right?

17 A Yes.

18 Q And there wasn't additional analysis that was performed
19 by your team in making those calculations?

20 A Nothing more than what we've talked about.

21 Q Okay. Turning next to the Klarquist Sparkman law firm.

22 A Okay.

23 Q Is it your opinion that Microsoft incurred [REDACTED] in
24 fees and costs based on the work performed by the
25 Klarquist firm?

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1 A Yes.

2 Q And in making that calculation, did you follow those same
3 two steps outlined on Page 13 of your report?

4 A Yes.

5 Q And so did your team similarly rely on the information in
6 the invoices that you were provided, enter that
7 information into an Excel spreadsheet, and Excel
8 calculate the total?

9 A Yes.

10 Q And there wasn't any additional analysis that you and
11 your team performed in making those calculations,
12 correct?

13 A Other than what we've described.

14 Q Turning, lastly, to the Calfo Harrigan law firm--

15 A Yes.

16 Q Which you begin discussing on Page 16 of your report, is
17 it your opinion that Microsoft incurred [REDACTED] in
18 attorney fees and costs from the work that the Calfo
19 Harrigan firm did?

20 A That's correct.

21 Q Do the steps on Page 17 of your report reflect how you
22 calculated the total for the Calfo Harrigan firm?

23 A Yes.

24 Q Is it correct that Step 1 is just the creation of an
25 Excel spreadsheet?

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1 A Yes, a data entry template so we can input the data.

2 Q And Steps 2 and 3 are the inputs of that data, correct?

3 A That's correct.

4 Q It looks like it jumps from Step 3 to Step 5.

5 Is that just a--

6 A I think that's an error. I think that's a typo.

7 I apologize for that.

8 Q Step 5 and 6 are-- appear to be calculations; is that
9 right?

10 A Yes.

11 Q And were those calculations performed by Excel?

12 A Yes.

13 Q Was there any analysis that you or your team performed in
14 making these calculations for the Calfo Harrigan firm?

15 A In the same sense that we've talked about.

16 Q You relied on what was in the invoices, input that into
17 an Excel spreadsheet, and Excel calculated the totals,
18 correct?

19 A That's correct.

20 Q Now, for Calfo Harrigan, to perform the calculations, you
21 relied on invoices from the Calfo Harrigan firm, correct?

22 A That's correct.

23 Q And is it correct that from-- for the Freshfields,
24 Boehmert, and Klarquist law firms, you relied on data
25 from Microsoft's TyMetrix 360 system?

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1 A That's correct.

2 Q Okay. And was it similarly created, sorting in the Excel
3 spreadsheet that you created?

4 A Yes, using a pivot table.

5 Q And when it refers to the client matter, there are only
6 three listed here, right?

7 A That's correct.

8 Q And is that because the Sidley invoices used-- ultimately
9 ended up using three different matters for-- that cover
10 work that they're claiming fees and costs for in this
11 case?

12 A I believe that's correct.

13 Q So when you refer to a client matter here, you're not
14 referring-- you're referring to a client matter as
15 referenced in invoices from Sidley to Microsoft, not
16 separate legal matters in various courts, correct?

17 A That's correct.

18 Q Turning next to Exhibit No. 5, can you explain to me what
19 this exhibit is intended to show?

20 A We were asked to also prepare a schedule that showed the
21 Sidley Austin fees and expenses by various subjects, so
22 these were the subjects that were given to us by
23 Ms. Robbins, and this is how the numbers came out.

24 Q Do you recall when you were asked to divide up the
25 information by various subjects?

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1 A In a general sense, probably towards mid May, maybe a
2 little more towards when the report was issued.

3 Sometime probably in the May 15th, May 29th time
4 frame.

5 I don't remember exactly when.

6 Q How did you determine how to divide up the work by
7 various subject matters?

8 A That was given to us by Ms. Robbins.

9 Q Okay. In what form?

10 A I believe the-- it was listed on-- and you had one of the
11 invoices here, either 1, 2, or 3 next to the entries.

12 Q And you're referring, for the record--

13 A I'm referring to Exhibit No. 5, which is a Sidley
14 invoice.

15 Q And is it correct that it's the invoices that end with
16 the letter B that have the, in addition to highlighting,
17 numbers 1, 2, and 3 added to them?

18 A I believe that's correct.

19 Q And do you know when you were given those invoices?

20 A I don't recall the exact timing of those.

21 Q Can you recall sort of the proximity to the May 29th date
22 that you served your report?

23 A Again, it was probably sometime in the latter-- the
24 second half of the month.

25 I would be guessing what date.

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1 Q Do you know the purposes of dividing up the data into
2 these different subject matters?

3 A The ultimate purpose, no.

4 I was asked to do this, and it was relatively easy
5 for us to do it.

6 Q You said Ms. Robbins asked you to do it; is that right?

7 A That's correct.

8 Q Do you know whose idea it was to divide up the data in
9 this way?

10 A I do not.

11 Q Do you know how-- we discussed earlier the methodology
12 used by Ms. Robbins for going through and highlighting
13 the various task entries on the Sidley invoices.

14 Do you know what methodology was used to identify
15 which tasks fall into these subject matters?

16 A I do not.

17 Q Did you ask Ms. Robbins or anybody else how that was
18 done?

19 A I don't remember that conversation, having that such
20 conversation.

21 Q And is it correct that-- and if you want to refer to
22 Menenberg Exhibit No. 5, you're welcome to, but not every
23 task that was allocated to Motorola's alleged breach of
24 contract falls into the three subject matter areas
25 reflected in Exhibit No. 5; is that right?

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1 so I haven't done the math, but that might be the grand
2 total for Freshfields as well?

3 A It is.

4 Q Okay. So there weren't allocations that were performed
5 for those three firms, correct?

6 A No.

7 Q You relied on the invoices themselves?

8 A That's correct.

9 Q So it's only the Sidley firm where you had this
10 additional system of assigning tasks to 1, 2, or 3 to
11 break them down into these subject matters, correct?

12 A That's correct.

13 Q For the antisuit injunction and 9th Circuit appeal,
14 there's an entry for Sidley Austin, and then there's the
15 summed amount from the invoices and the allocated amount
16 for claim.

17 A Right.

18 Q The latter number is lower.

19 Do you know why that is?

20 A I would have to look into the specific line item.

21 I don't know as I sit here.

22 It's approximately \$560 lower.

23 I don't recall as I sit here.

24 Q And is it correct that you don't know how Sidley
25 determined what tasks to attribute to the German

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1 litigation, what tasks to attribute to the antisuit
2 injunction and 9th Circuit appeal, and what tasks to
3 attribute to the 3H.264 patents in the 1823 case?

4 A I don't know the criteria, how Ms. Robbins sorted them
5 into those categories.

6 Q Okay.

7 A I only know she did that.

8 Q As far as you know, Ms. Robbins is the one that did that
9 though?

10 A I understand that's the case.

11 Q I think you already stated this before, but you don't
12 have an opinion whether the attorney fees and costs
13 calculated in your report were caused by the alleged
14 breach of contract by Motorola, correct?

15 A I think we went over that.

16 I'm not here to give an opinion narrowly on that
17 point.

18 My role was to compile those costs and do the math.

19 Q Okay. And you have not formed an opinion regarding the
20 total amount of fees and costs incurred as a result of
21 Motorola's alleged breaches based on work performed in
22 the 1823 action, the action that this deposition is in;
23 is that right?

24 A I don't believe that's part of the scope of my work.

25 Q And the same is true with respect to each of the other

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1 individual actions that Microsoft is seeking attorney
2 fees and costs for, you have not performed calculations
3 and therefore formed an opinion as to the total amount of
4 fees and costs incurred in each of the individual
5 actions; is that right?

6 A That's correct.

7 I've only been asked to do and present them as I've
8 done.

9 Q Right. Okay.

10 And have you performed any calculations or formed an
11 opinion regarding the total amount of fees and costs
12 incurred as a result of Motorola having sent letters to
13 Microsoft, dated October 21st and October 29th, offering
14 to license patents to Microsoft?

15 A I don't recall my work ever considering these specific
16 letters and doing specific calculations related to those
17 letters and those dates.

18 Q Okay. Have you done any calculations or formed an
19 opinion regarding the total amount of fees and costs
20 incurred by Microsoft as a result of Motorola having
21 sought injunctive relief for Microsoft's infringement of
22 Motorola's standard essential patents?

23 THE WITNESS: Would you please read
24 that back?

25 That was kind of a long question.

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(Question on Page 102, Line 18-
22 read by the reporter.)

THE WITNESS: Only to the extent that
it's already reflected in these numbers.

Q (By Ms. Roberts) Have you performed any calculations or
formed an opinion regarding the total amount of fees and
costs incurred by Microsoft as a result of Motorola
having not issued a patent license to Marvel (phonetic)?

A To Marvel?

Q Mm-hm.

A Only to the extent it's reflected in the invoices.

I'm not familiar, as I sit here, with Marvel and the
impact, but if it's part of the invoice billed up in the
numbers, then it would be there, but I don't know.

Q Have you performed any calculations or formed an opinion
regarding the total amount of fees and costs incurred by
Microsoft as a result of Motorola allegedly not offering
a license to Microsoft on terms of Google's MPEG-LA
license?

A Again, only to the extent it's already incorporated in
the task and related costs and expenses in the work I've
done.

Q Is it fair to say that with respect to the attorney fees
and costs, you have calculated a total amount but have

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1 not tied any computations to any specific theories of
2 breach by Microsoft?

3 Is that correct?

4 A I think that's fair.

5 Q And you are aware that this is a breach of contract case,
6 correct?

7 A Yes.

8 Q And are you aware that Microsoft claims that Motorola
9 breached two different contracts, one with the IEEE and
10 one with the ITU?

11 A I believe that's correct.

12 Q And did you perform any calculations or form an opinion
13 regarding the total amount of fees and costs incurred as
14 a result of Motorola allegedly breaching each of those
15 contracts?

16 A I don't believe we did that.

17 Q Okay. So, once again there's just a grand total, no
18 calculation of damages for each contract at issue?

19 A Well, the numbers are for the respective different sorts
20 that we did.

21 I don't think we did it for the two individual ones,
22 as you posed the question.

23 Q Okay. Let's move on to the calculations of the facility
24 relocation.

25 First of all, can you explain to me the methodology

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1 used by you and your team to-- let me start over.

2 If we turn to Page 19 of your report--

3 A I'm with you.

4 Q There's a table there.

5 Does that table accurately summarize your opinion
6 with respect to the total amount of damages incurred
7 allegedly, based on the facility relocation and operating
8 costs?

9 A It does.

10 Q Okay. And can you explain to me the methodology that you
11 and your team used to get to these totals?

12 A Well, we met with counsel. We had discussions with
13 Microsoft personnel.

14 I tried to learn as much as I could about the
15 context of what happened.

16 We reviewed a lot of source documents.

17 We had discussions with counsel about specific
18 elements of cost that would likely be included in such a
19 move.

20 It was an iterative process where as we started
21 getting documents, we started compiling and computing
22 those costs.

23 Q With respect to the attorney fees and costs, you and your
24 team primarily relied on the data in invoices and
25 inputted that data into a spreadsheet to make your

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1 calculations, correct?

2 A That's an oversimplification, but that's generally
3 correct.

4 Q Is that generally what you did with respect to the
5 facility relocation?

6 A I think here, because of the nature of these costs, we
7 delved deeper into getting underlying support in
8 contemporaneous accounting records.

9 Q Can you sort of expand on that for me?

10 A Well, in the case of the legal invoices, we didn't ask
11 for timecards or timesheets from the lawyers. We took,
12 as our basic underlying document, the invoice provided by
13 the lawyers.

14 Here, rather than just accept a sum total, we said,
15 "Well, let's look at the invoices behind that or let's
16 look at a contract behind that or some other underlying
17 corroborating evidence."

18 Q Other than requesting the corroborating evidence, was
19 there analysis that you and your team performed separate
20 and apart from the calculations of the numbers in the
21 invoices?

22 A I don't understand your question.

23 What other analysis are you talking about?

24 Q Well, I'm not sure if there is any that exists.

25 I want to make sure I understand everything that you

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1 did.

2 A Well, this is a lot of work.

3 I mean, just saying was there any other analysis-- I
4 mean, all of these things involved detailed analysis and
5 a lot of hours and a lot of calculations, and auditing
6 was done.

7 Q If you could describe for me what the analysis was.

8 Were you making decisions about whether invoices
9 should or should not be included?

10 A We inquired about invoices, the logic as to why they were
11 included and didn't make sense and was it appropriate to
12 include them.

13 Based on our work, we included those that we thought
14 there was a reasonable basis to include them.

15 Q How did you determine whether there was a reasonable
16 basis or not to include invoices?

17 A You know, we looked at a lot of invoices.

18 I just-- as I sit here, I don't recall specifically
19 a particular invoice that we said was rejected.

20 I just don't remember, but we looked at a lot of
21 different ones and ultimately concluded the amounts
22 reflected here are supported by the documentation
23 indicated in the report-- was appropriate and reasonable.

24 Q Do you recall there being invoices that you were
25 presented with that you chose not to include and rely

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1 recall-- I think I know the spreadsheet you are talking
2 about.

3 It had a lot of tabs and a lot of calculations--

4 Q Yeah. It was unfortunately way too large for me to bring
5 today--

6 A It's cumbersome.

7 Q Yeah.

8 A Well, that schedule was largely supported by the price
9 book and other source documents, so you could reference
10 to that schedule and you probably could come to the
11 same-- I think you could come to the same numbers, but we
12 just used that as a tool to go back to the source
13 documents and recalculate it ourselves.

14 Q Okay.

15 A So ultimately I'm relying on, for example, in this case,
16 the price book, although I think those spreadsheets that
17 you talked-- I don't have that in front of me, but I
18 believe that also developed a similar calculation.

19 Q That large cumbersome spreadsheet, do you recall if that
20 was a spreadsheet that Microsoft kept in the ordinary
21 course of business and provided to you or is that
22 something that your team created--

23 A No. That was something that was provided to us.

24 Q Okay.

25 A Prepared in the ordinary course of business? I don't

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1 recall if it was or if it was provided to help develop
2 the calculation for the claim, but I'm not sure what you
3 mean when you say "ordinary course of business," if
4 that's also the course of business--

5 Q Fair point.

6 The reason I asked is because it was produced on the
7 same day as your report, so I wasn't sure if it was part
8 of your work papers or--

9 A It was not part of my work papers.

10 Q Okay.

11 A I don't think so, if we're talking about the same
12 schedule.

13 Q Okay. So going back to the fixed costs and the totals
14 that you rely upon to calculate the difference in fixed
15 costs between operating in The Netherlands and in
16 Germany, so are you-- is it your testimony that those
17 numbers came largely from the Arvato price book that you
18 have in front of you?

19 A For the German ones, yes.

20 Q For the German ones?

21 A And other sources, but most of them are from their Arvato
22 price book, and then I can go to each of the different
23 ones.

24 Q Before you do, could you tell me the date of the Arvato
25 price book you were just looking at?

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1 Q Now, what about Mr. Davidson's testimony that-- at which
2 you alluded to earlier, that Arvato was not very
3 cooperative in the transition with Ceva, and Mr. Davidson
4 said that that was a distraction for management and they
5 had to deal with that.

6 Did you make any adjustments to the numbers based on
7 that problem caused by Arvato?

8 MR. HARRIGAN: Objection; lack of
9 foundation.

10 Go ahead.

11 THE WITNESS: I didn't make any
12 adjustment based on what the predicate of your question
13 was.

14 I don't know necessarily how-- if, in fact, that
15 changes any number.

16 Q (By Ms. Roberts) Now, to confirm, you do not have an
17 opinion regarding whether Motorola's conduct caused
18 Microsoft to relocate the EMEA distribution facility,
19 correct?

20 A Well, I've read the depositions, and it's, I think,
21 pretty apparent this move was caused by the issue that
22 we're debating in this litigation.

23 I don't think they just did this exclusive of what
24 happened.

25 Q Do you have an opinion in your report on causation?

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1 A It's not in my report, but you asked me my opinion.

2 Really, through the depositions, it's pretty
3 apparent to me that this was something done as a result
4 of this litigation.

5 Q Okay. Are you planning to testify at trial that
6 Microsoft moved as a result of Motorola's alleged breach
7 of contract?

8 A I haven't been asked to do that, but if Counsel asks me a
9 question, I'll answer honestly what I think about it.

10 Q And all you've considered-- well, I'll withdraw that.

11 In terms of your calculations of the costs incurred
12 by Microsoft in association with the relocation, have you
13 done anything to form an opinion as to whether those
14 costs were reasonable?

15 THE WITNESS: May I have that read
16 back, please?

17 (Question on Page 176, Line 11-
18 14 read by the reporter.)
19

20 THE WITNESS: Well, two things:

21 One, and we've talked about it at some length, and I
22 talk about it in my report, I did a substantial amount of
23 work to validate those costs where that's concerned.

24 Second, in terms of the reasonableness as to the
25 types and amounts, I've read through the descriptions. I

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1 reasonable?

2 A I don't recall specifically articulating it in the way
3 you've asked the question, but as I say, they were the
4 types of costs and the amounts, to the extent I was
5 familiar with those particular items, that seemed
6 reasonable.

7 Q And have you analyzed the costs of any alternatives that
8 were available to Microsoft to relocate in the facility,
9 both those that Microsoft considered and perhaps
10 alternatives Microsoft did not consider?

11 A I have not.

12 Q And similar with the attorney fees, you've calculated a
13 total for the amount of costs for the relocation,
14 correct?

15 You have not broken it down based on costs incurred
16 as a result of any particular conduct by Motorola; is
17 that right?

18 A Yeah, I think we got the relocation and the question--
19 you're asking just about the attorney fees?

20 Q No. I'm asking similar to the attorney--

21 A I misheard you. I'm sorry. Please repeat it.

22 Q So similar to the attorney fees, for the relocation, you
23 calculated sort of a grand total.

24 You have not separately calculated the amount of
25 relocation costs incurred as a result of any particular

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1 conduct of Motorola that Microsoft constitutes-- claims
2 is a breach?

3 A I am not sure I understand the question.

4 Are you trying-- did I break out the relocation
5 expenses to the specific cases we're talking about?

6 Q Well, I can be more specific.

7 Earlier we talked about costs incurred as a result
8 of Motorola sending letters to Microsoft in October of
9 2010, offering to license patents to Microsoft.

10 Have you calculated which, if any, of the relocation
11 costs were incurred as a result of Motorola sending those
12 letters?

13 A No.

14 Q Okay.

15 A All those questions I can say no, but I'm comfortable in
16 the relocation costs, that they related to the decision
17 that Microsoft had to move from Germany.

18 They felt it was in their best interest, in light of
19 the litigation, to move from Germany to The Netherlands.

20 Q Right.

21 So my question is if you've categorized any costs in
22 the specific theories of breach--

23 A I didn't-- I'm sorry to interrupt you.

24 I didn't further delineate it.

25 Q Okay. And is the same true with respect to the two

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1 different contracts at issue, the one with the IEEE and
2 the ITU, you haven't segregated in any way the costs
3 incurred as a result of a breach of those contracts by
4 Motorola?

5 A That's correct.

6 MS. ROBERTS: Okay. I don't have any
7 further questions for you, Mr. Menenberg. Thank you for
8 your time.

9 VIDEOGRAPHER: Do you have any
10 questions?

11 MR. HARRIGAN: No.

12 VIDEOGRAPHER: We are going off the
13 record at 1:43 p.m. This is the end of Disc No. 3, and
14 this concludes this deposition for today.

15 (Deposition concluded at 1:43 p.m.)

16 (Signature reserved.)

17

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1 STATE OF WASHINGTON) I, Terilynn Pritchard, RMR, CRR,.
 2) ss CLR, a certified court reporter
 3 County of Pierce) in the State of Washington, do
 4 hereby certify:

5 That the foregoing deposition of TODD D. MENENBERG
 6 was taken before me and completed on June 20, 2013, and
 7 thereafter was transcribed under my direction; that the
 8 deposition is a full, true and complete transcript of the
 9 testimony of said witness, including all questions, answers,
 10 objections, motions and exceptions;

11 That the witness, before examination, was by me
 12 duly sworn to testify the truth, the whole truth, and
 13 nothing but the truth, and that the witness reserved the
 14 right of signature;

15 That I am not a relative, employee, attorney or
 16 counsel of any party to this action or relative or employee
 17 of any such attorney or counsel and that I am not
 18 financially interested in the said action or the outcome
 19 thereof;

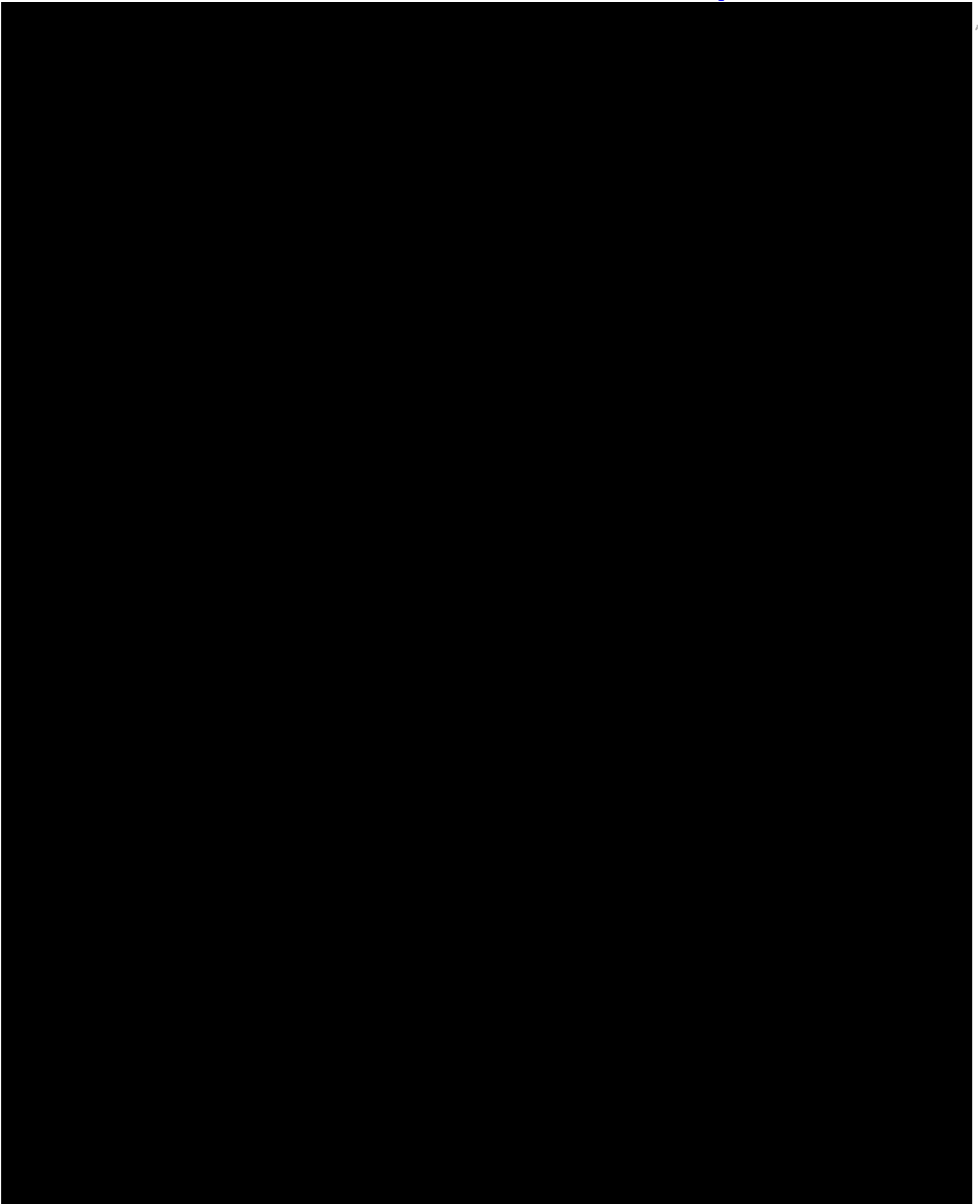
20 That I am herewith securely sealing the said
 21 deposition and promptly delivering the same to
 22 Attorney Andrea Pallios Roberts.

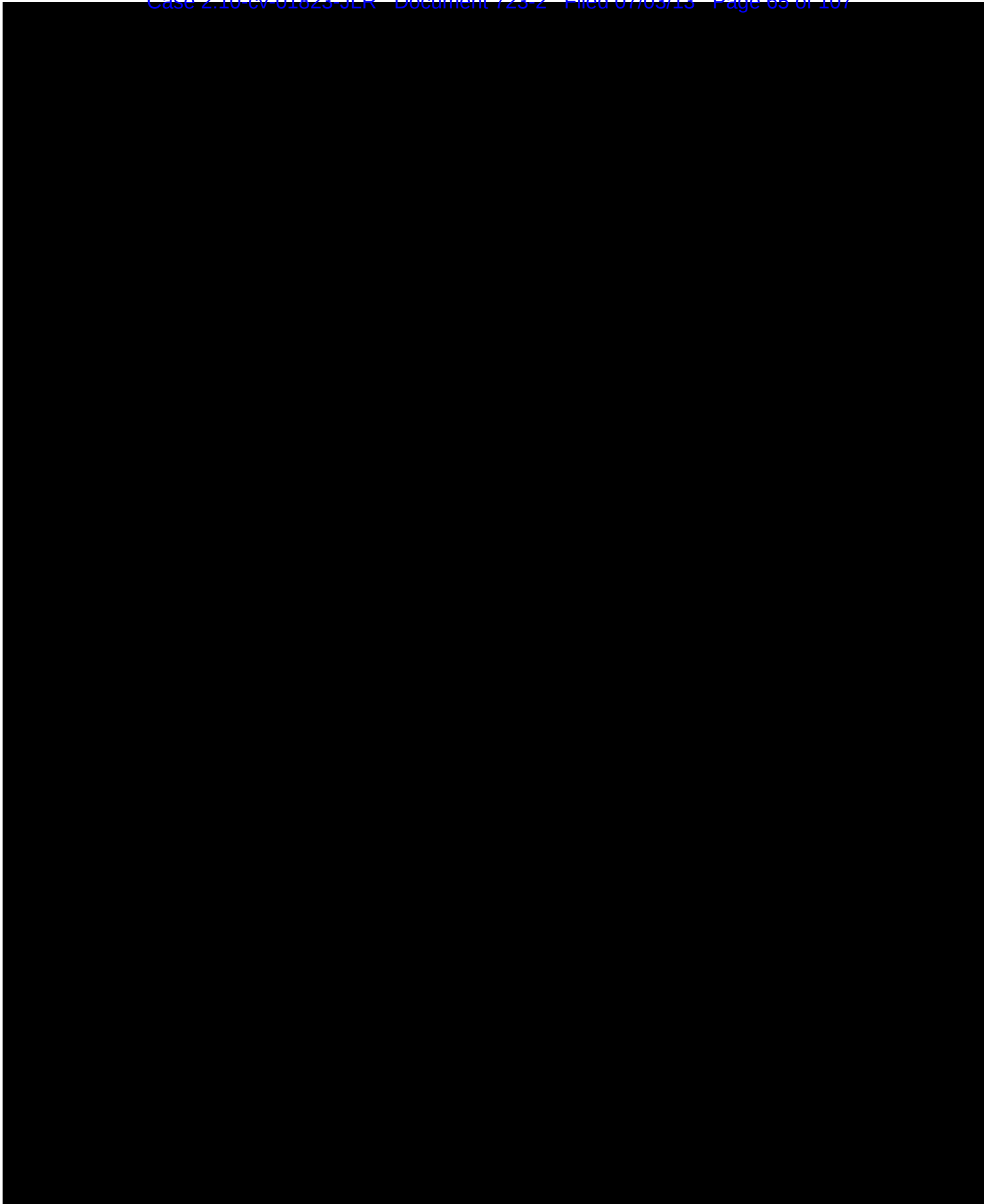
23 IN WITNESS WHEREOF, I have hereunto set my
 24 signature on the 25th day of June, 2013.

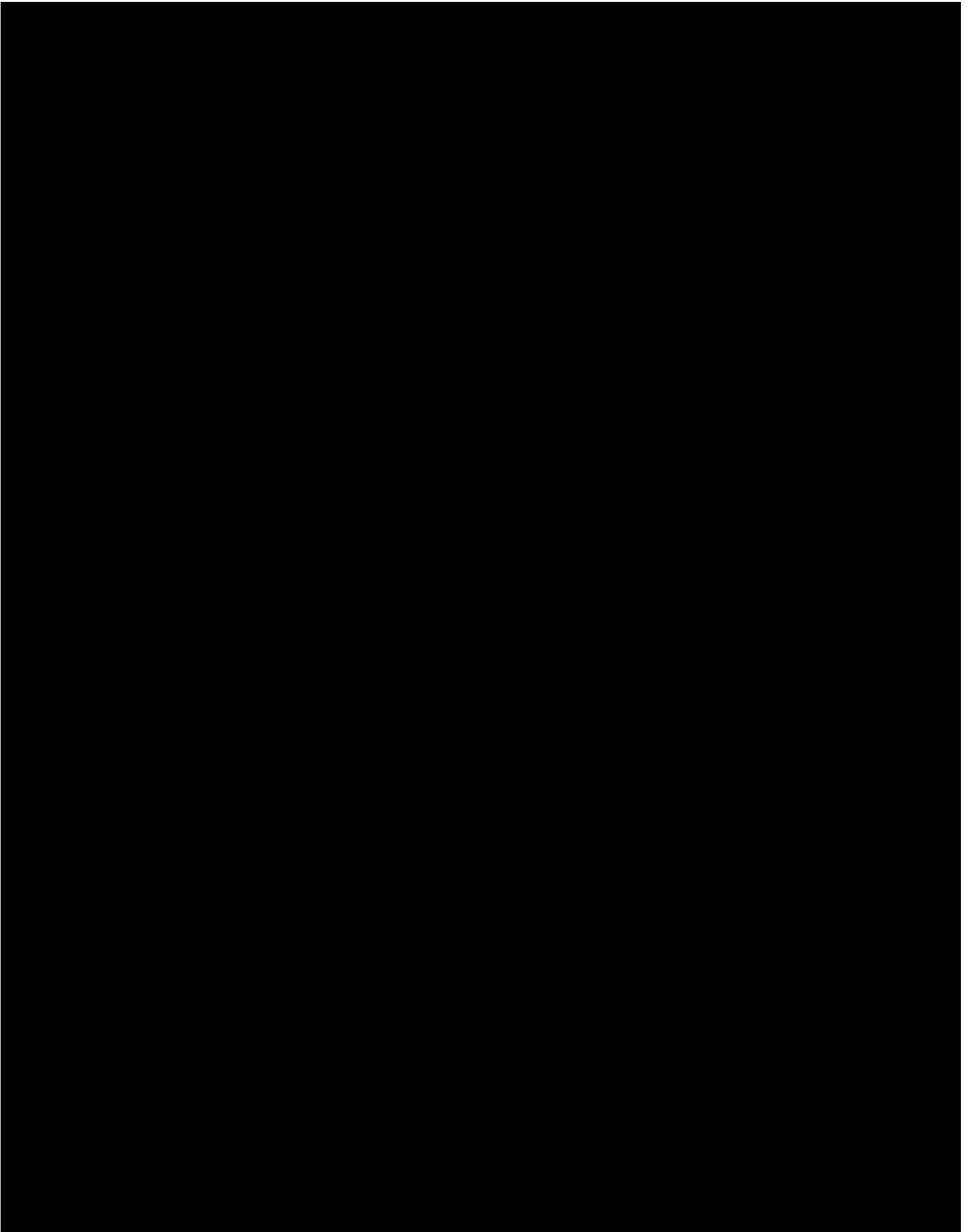
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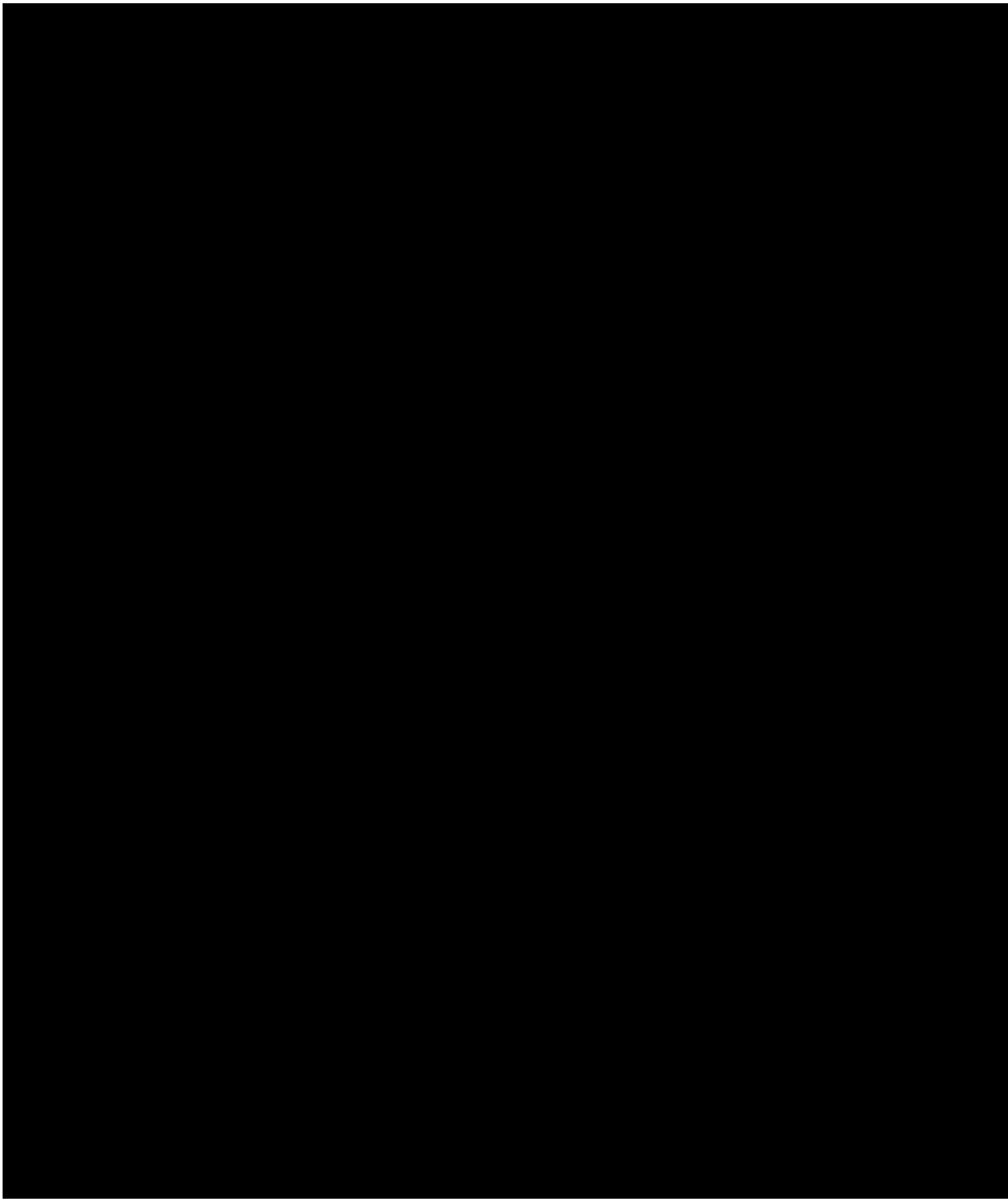
Terilynn Pritchard, CCR, RMR, CRR, CLR
 Certified Court Reporter No. 2047.

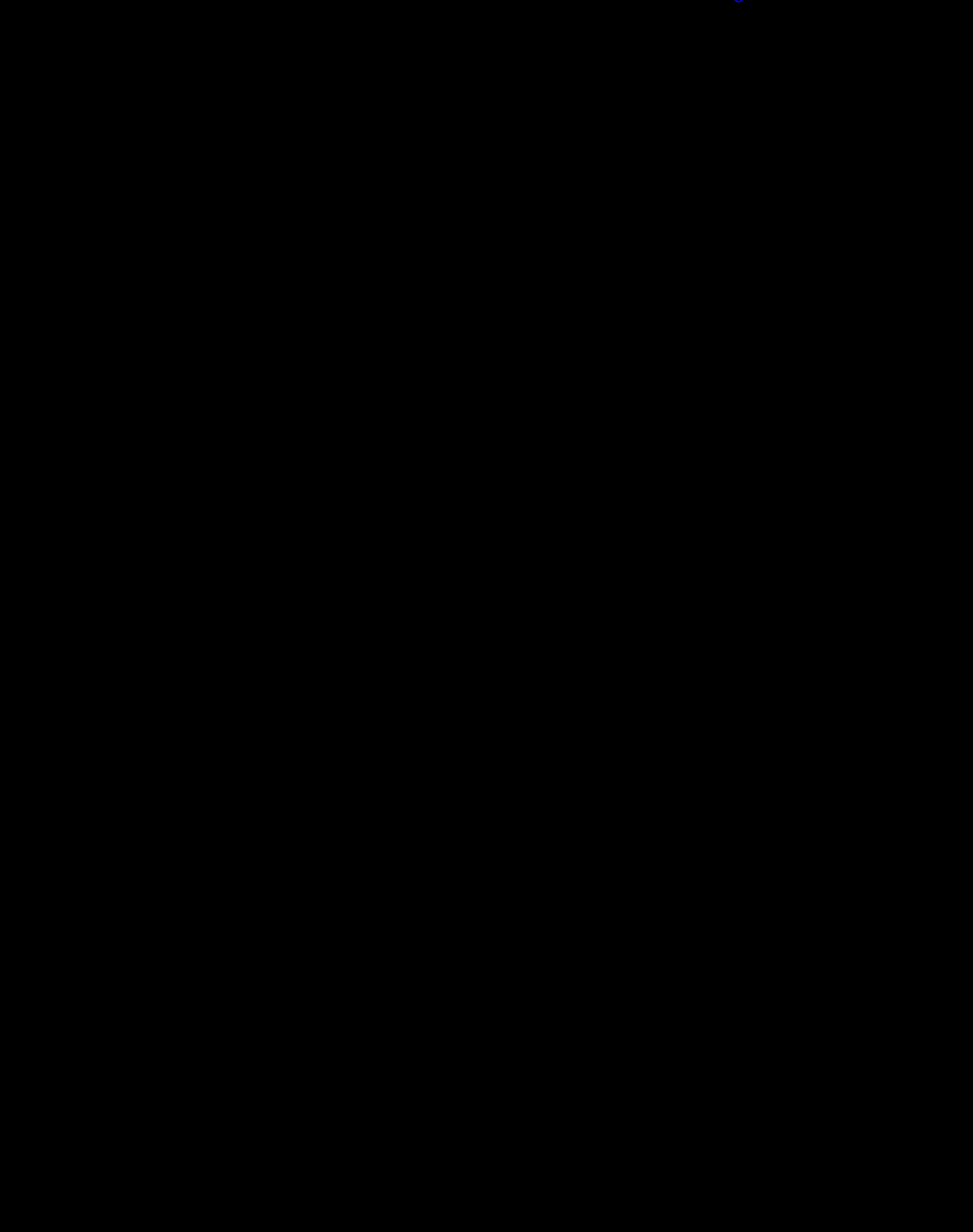




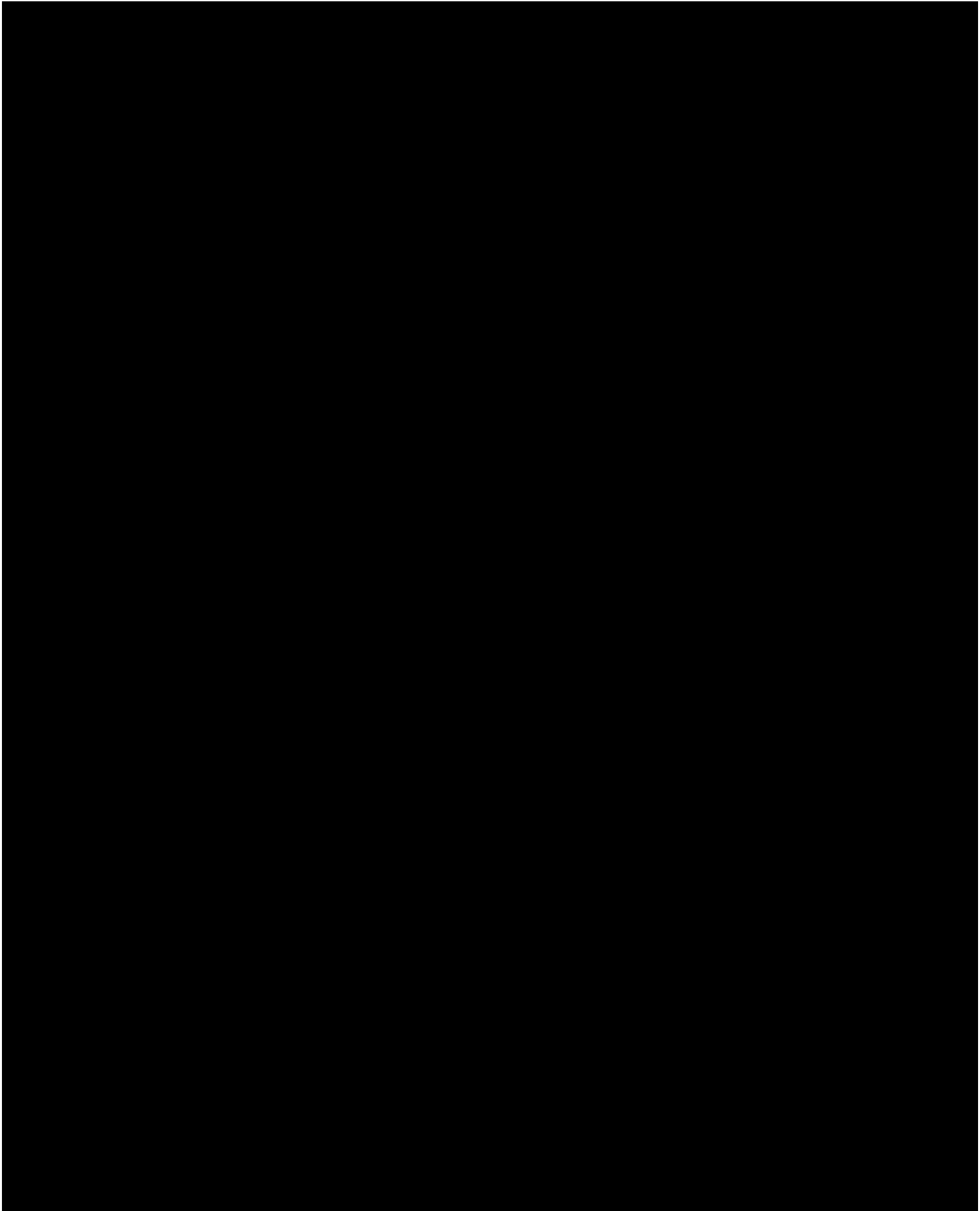


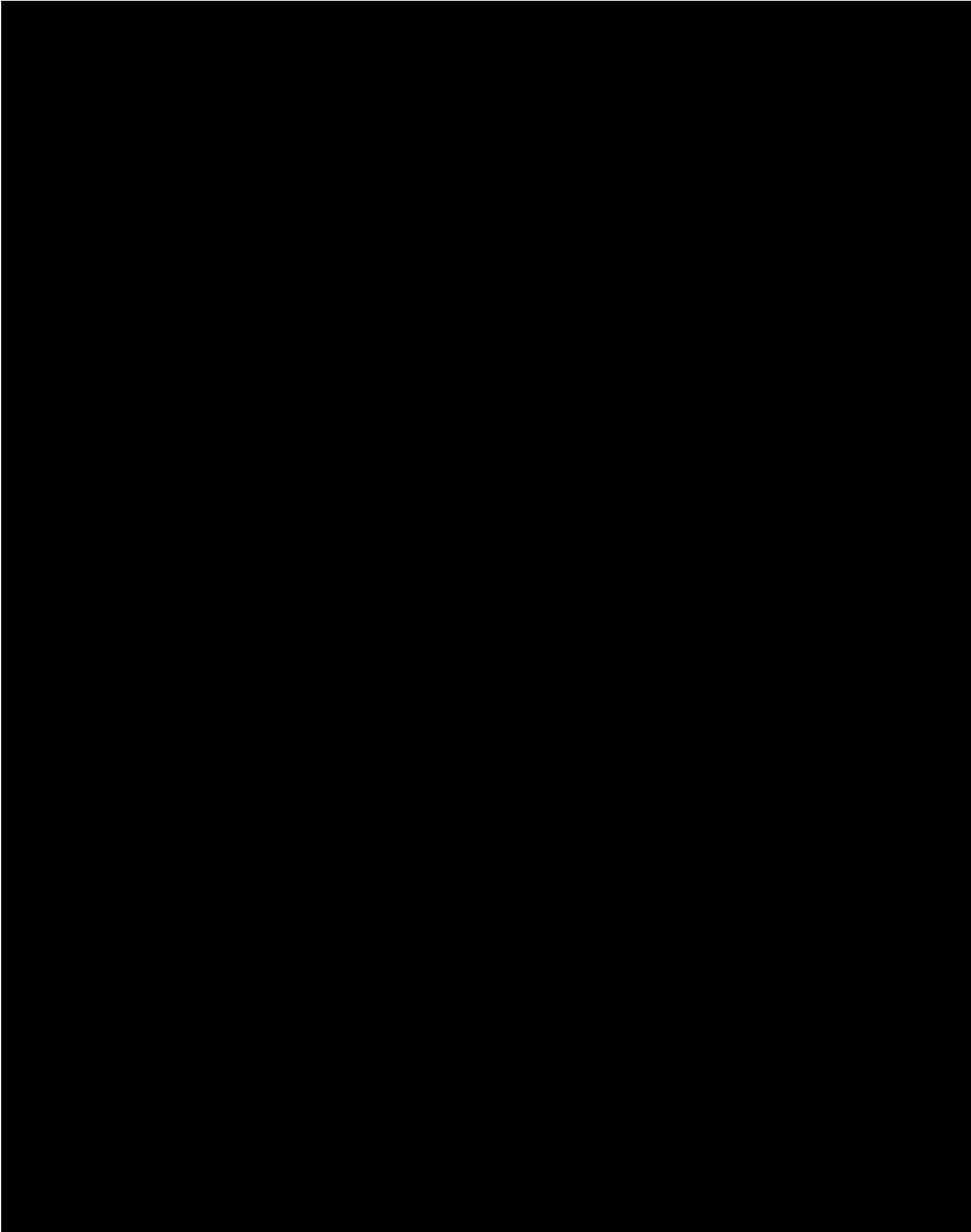


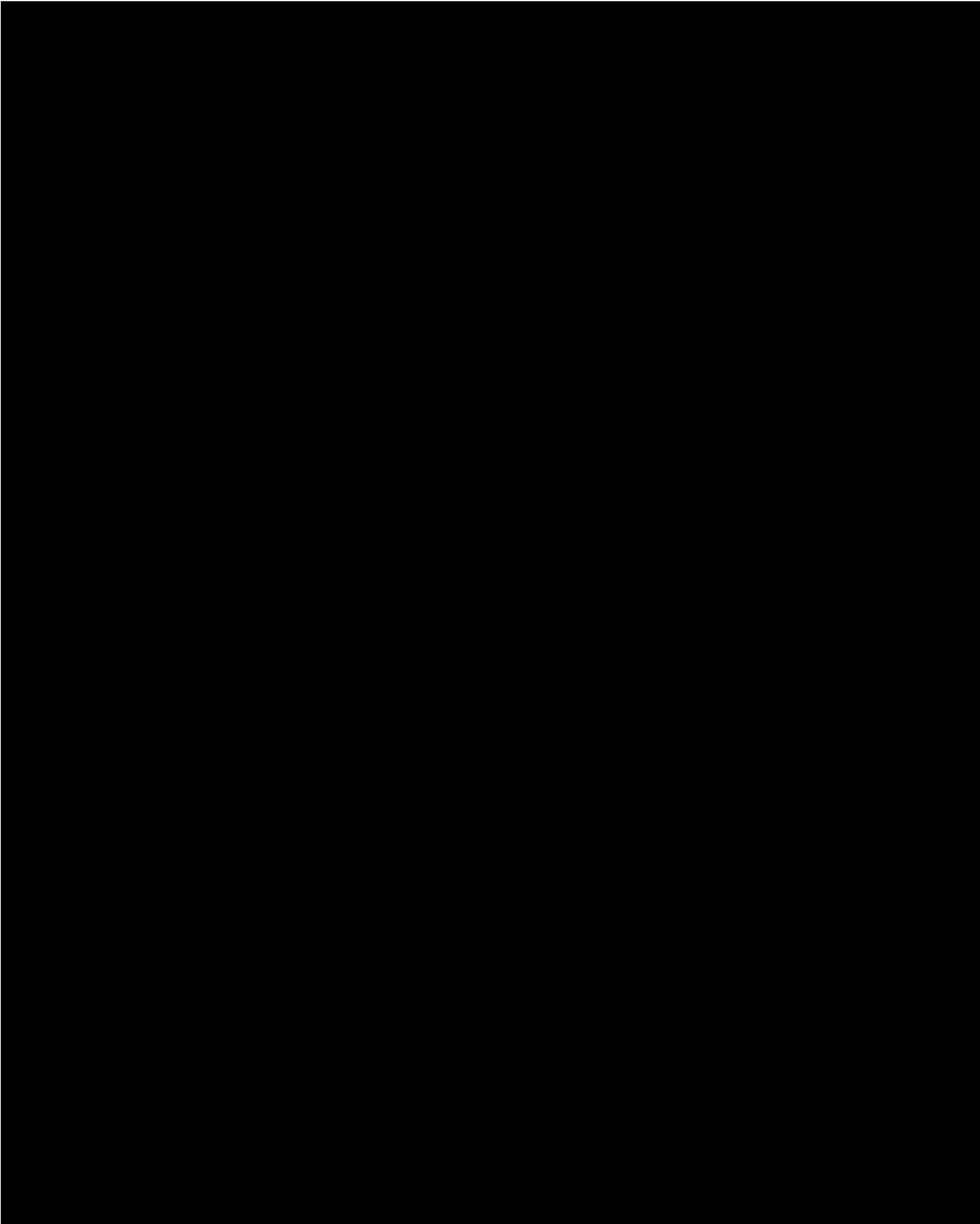


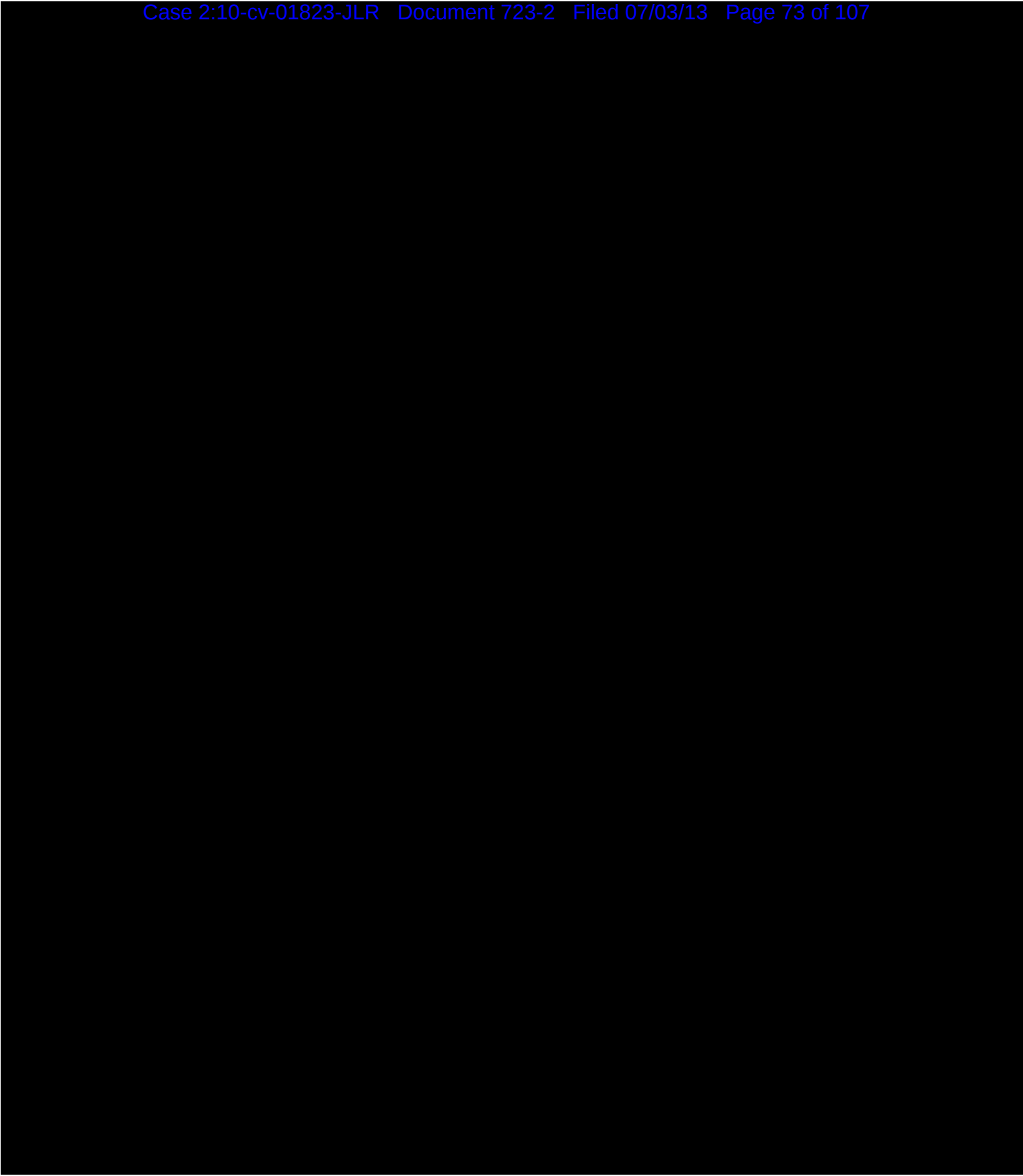






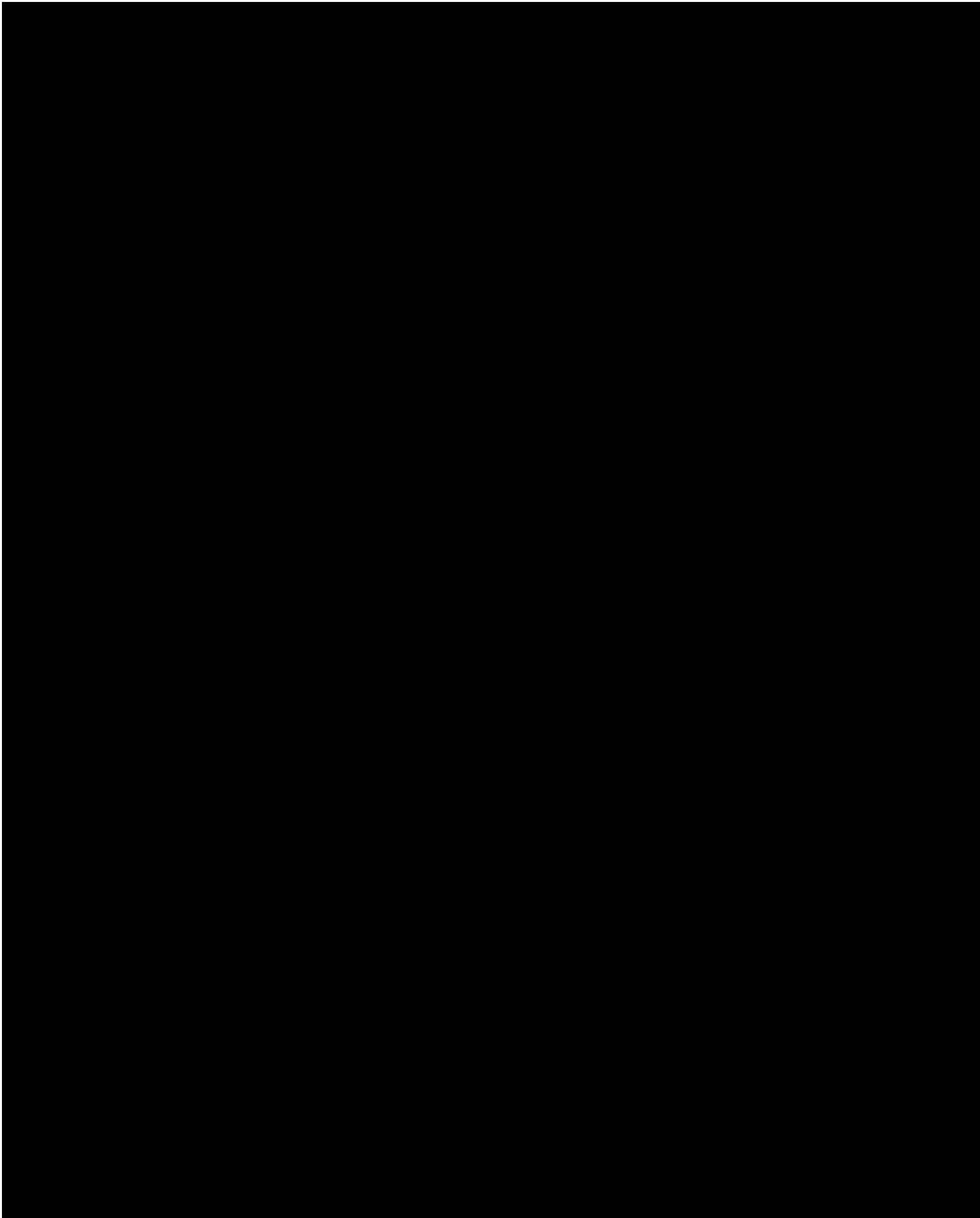


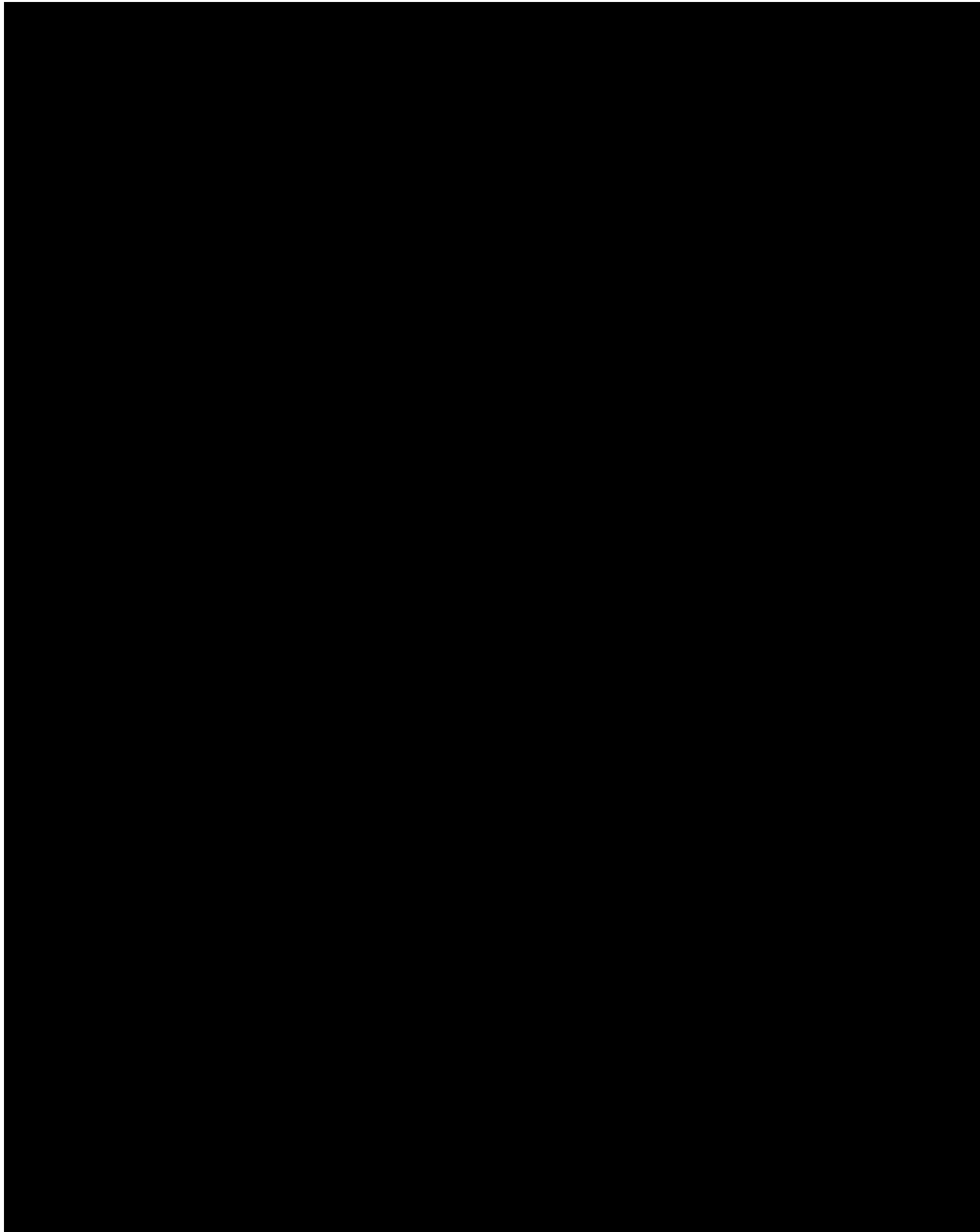


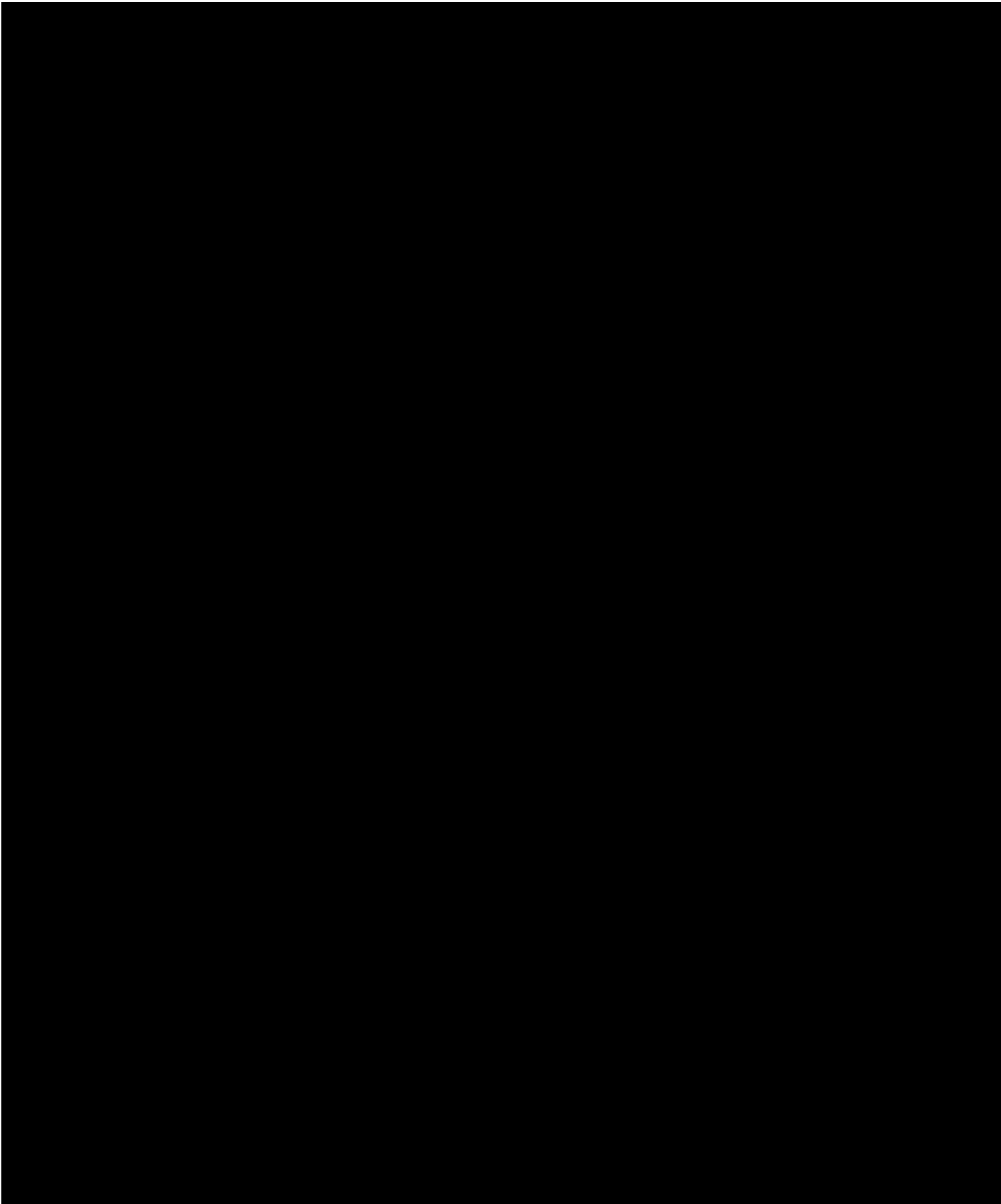


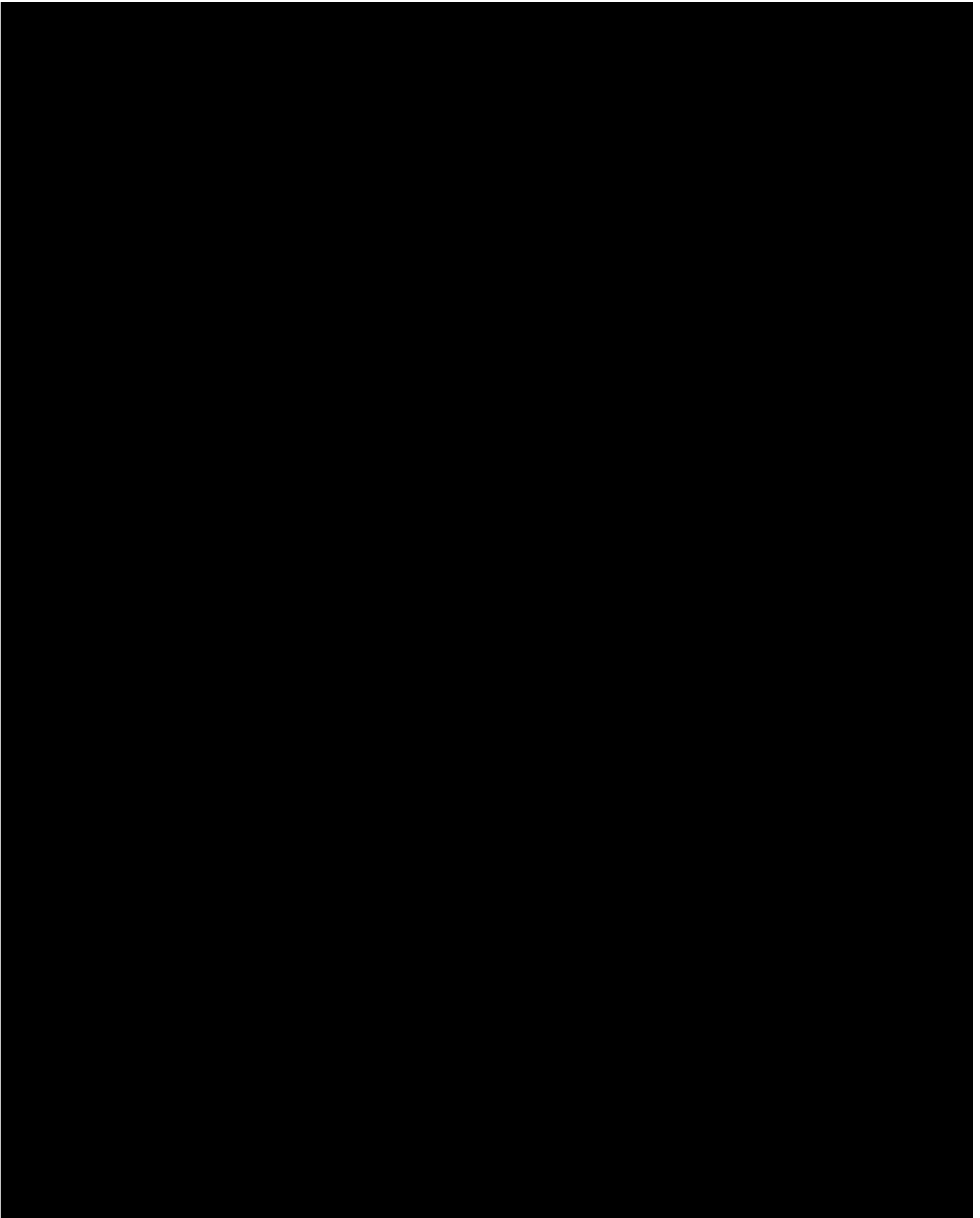
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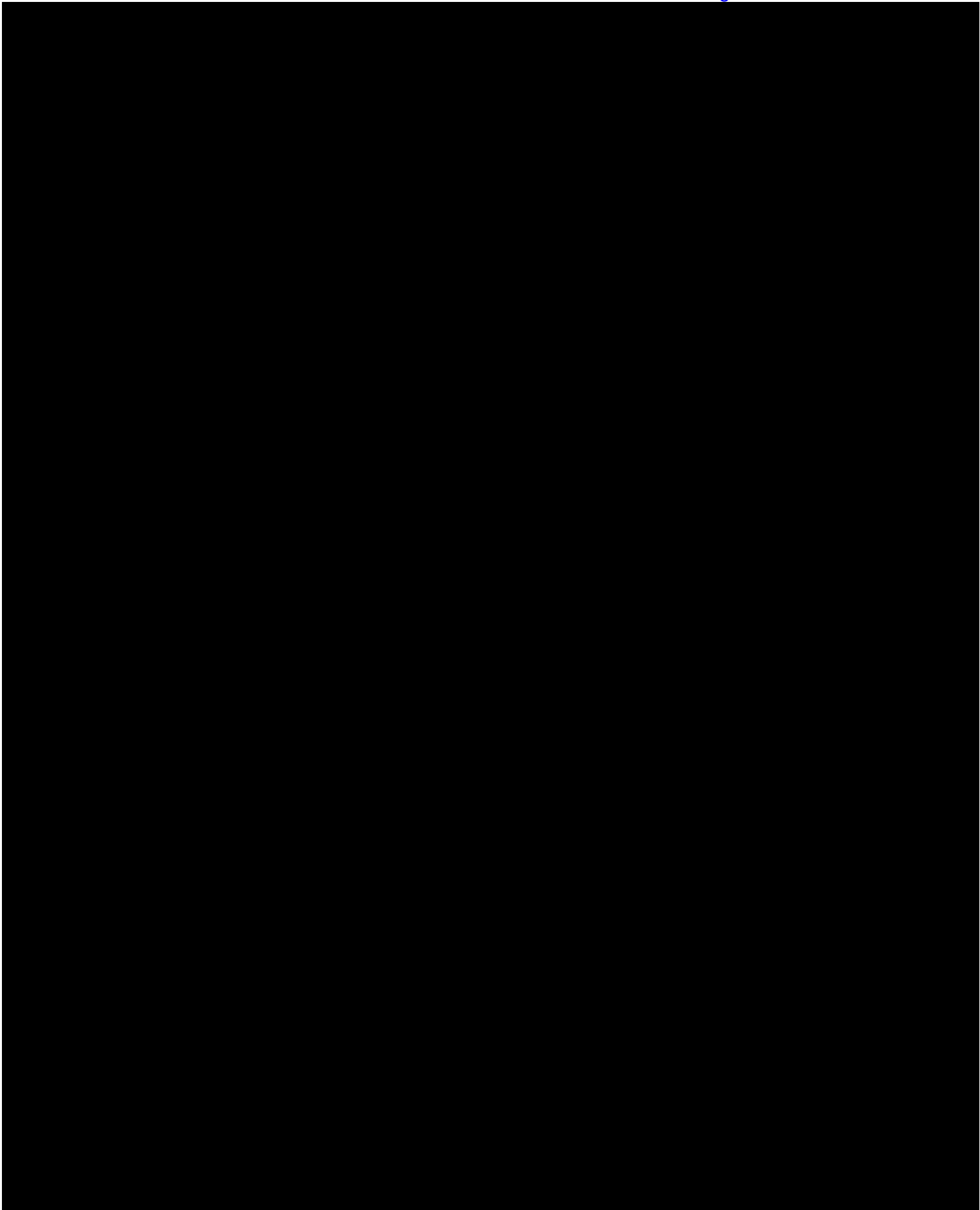


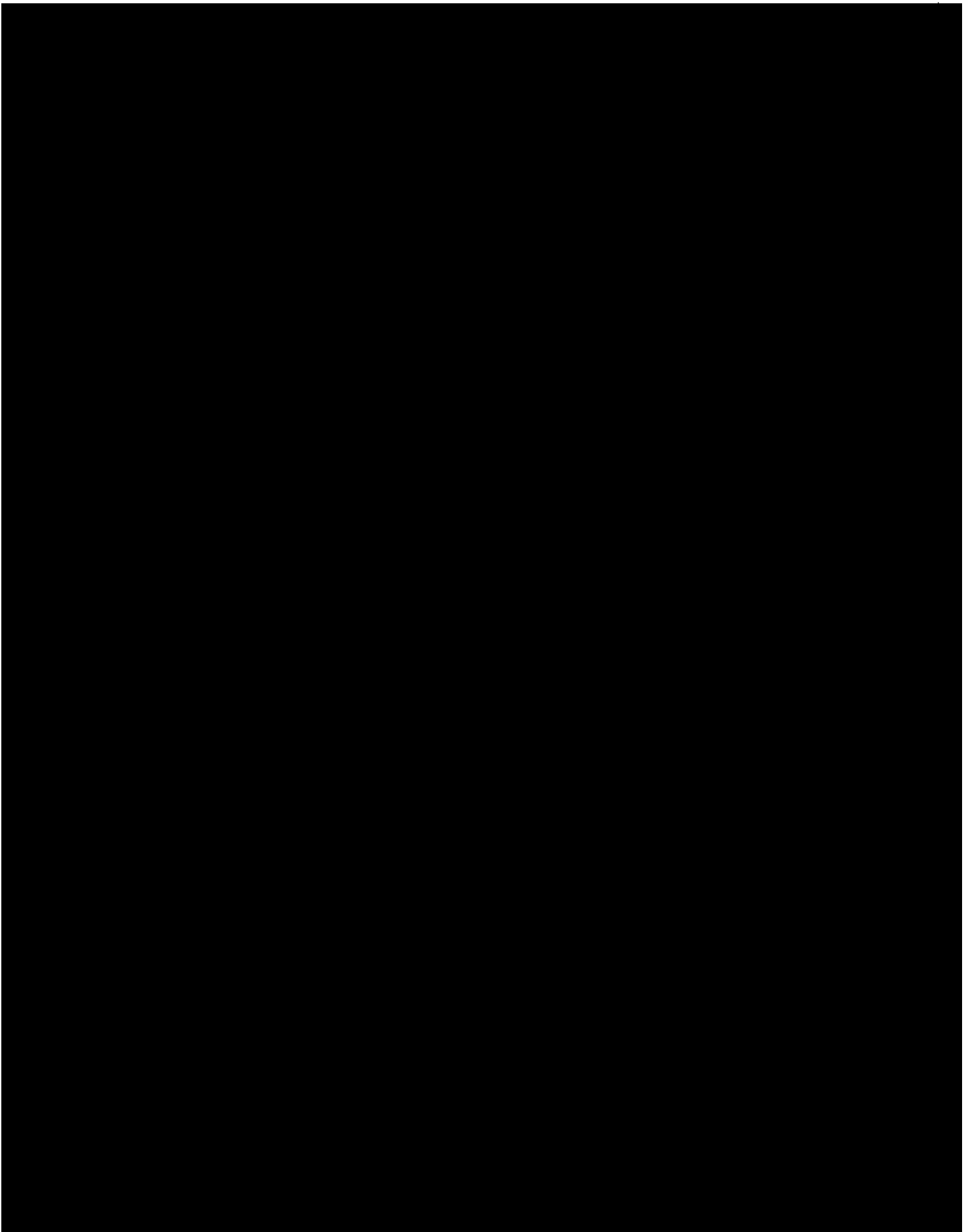












CONFIDENTIAL FINANCIAL INFORMATION PURSUANT TO PROTECTIVE ORDER

Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF FLORIDA

3 Case No. 1:10-CV-24063

4
5 MOTOROLA MOBILITY, INC.,

6 Plaintiff,

7 vs.

8 MICROSOFT CORPORATION,

9 Defendant.

10 -----/
11 MICROSOFT CORPORATION,

12 Counterclaim Plaintiff,

13 vs.

14 MOTOROLA MOBILITY, INC.,

15 Counterclaim Defendant.

16 -----/

17 CONFIDENTIAL FINANCIAL INFORMATION

18 PURSUANT TO PROTECTIVE ORDER

19 VIDEOTAPED DEPOSITION OF MATTHEW R. LYNDE, Ph.D.

20 East Palo Alto, California

21 Thursday, July 21, 2011

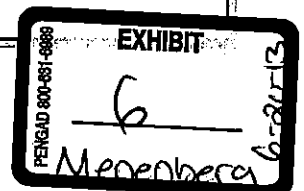
22

23 Reported by:

24 LORRIE L. MARCHANT, CSR No. 10523, RPR, CRR, CCRR, CLR

25 JOB NO. 40487

TSG Reporting 877-702-9580



CONFIDENTIAL FINANCIAL INFORMATION PURSUANT TO PROTECTIVE ORDER

Page 2

1 July 21, 2011

2 9:01 a.m.

3
4 Videotaped deposition of MATTHEW R.
5 LYNDE, Ph.D., held at the offices of
6 Ropes & Gray, 1900 University Avenue,
7 6th Floor, East Palo Alto, California,
8 before Lorrie L. Marchant, a Certified
9 Shorthand Reporter, Registered
10 Professional Reporter, Certified
11 Realtime Reporter, California
12 Certified Realtime Reporter and
13 Certified LiveNote Reporter.
14
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22
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TSG Reporting 877-702-9580

EXHIBIT C

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Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF WASHINGTON

3
4 AT SEATTLE

5
6
7
8 MICROSOFT CORPORATION, a)

9 Washington corporation,)

10)
11 Plaintiff,)

12) No. 2-10-cv-

13 vs.) 01823-JLR

14)
15 MOTOROLA, INC., and MOTOROLA)

16 MOBILITY, INC.,)

17)
18 Defendants.)

19
20
21 VIDEOTAPED 30(b)(6) DEPOSITION OF DAVID KILLOUGH

22
23 May 6, 2013

24
25 Job No. CS1661676 Seattle, Washington

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1 these different responsibilities?

2 A I personally am not aware of anything like that,
3 other than the -- as would be reflected in the
4 billings.

5 Q So if you wanted to figure that out, you would have
6 to -- you would look at the invoices and try to
7 figure it out, or ask your counsel?

8 A One of those two things.

9 Q Okay.

10 A That's -- that's what I would do, is either look at
11 the billings and determine it for myself or ask
12 outside counsel to give me the information.

13 Q Got it.

14 And then was work performed -- let me start over.

15 Was Sidley's work on Motorola's affirmative
16 claims in the 699 action and Sidley's work on
17 Microsoft's counterclaims in the 699 action, was that
18 billed to different matter numbers or other- --
19 otherwise segregated in bills?

20 A The -- you know, for a considerable time -- you know,
21 in excess of a year, I think -- all of the Sidley
22 work was billed to a single matter regardless of --
23 you know, a single internal billing matter at
24 Microsoft and was not divided out between, you know,
25 Florida or the ITC or Wisconsin. It was all billed

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1 to the same matter for some long period of time; in
2 excess of a year.

3 And then later, it was broken down to different
4 matters. I can't remember, you know, how many
5 different matters.

6 Q I -- I've seen some Sidley bills that say "Cell Phone
7 Patents" on them in the re: line on the first --
8 first page, as opposed to Motorola RAND 1823 case or
9 ITC 752 investigation.

10 The ones labeled "Cell Phone Patents," is that
11 what you're referring to as everything being billed
12 in one matter?

13 A I wouldn't know without looking.

14 Q Okay. We'll -- we'll take a look at one of those in
15 a bit.

16 So just to make sure I understand, though, you
17 said for a period of about a year, Sidley's bill --
18 Sidley's bills included all of their work on
19 Microsoft's matters versus Motorola.

20 Is that correct?

21 A In -- yes. In excess of a year, I said.

22 Q Okay, in excess of a year.

23 And so that would include -- let me rephrase.

24 Would that include both work on cases where
25 Microsoft was a plaintiff and cases where Motorola

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1 was a plaintiff?

2 A Right.

3 Q Okay. And would that include work on affirmative
4 claims and counterclaims?

5 A Right.

6 Q And was there any procedure for differentiating the
7 work in -- in the bills that you received to
8 designate which matter or which claims the work
9 related to?

10 A Nothing that I would categorize as procedural. You
11 know, one could tell from the matter descriptions,
12 you know, what -- you know, that's how I would
13 determine if I were attempting to determine, was by
14 looking at the matter -- by looking at the
15 description of the activity that was being billed
16 for; the line item.

17 Q Okay. But otherwise, that would be the only way
18 to -- to figure that out, or ask the time- --
19 timekeeper at issue?

20 A Right. Right. Or -- yeah, look at the -- look at
21 the substance of the time entry, you know, ask the
22 timekeeper. And both of those things, you know,
23 would be in the context of understanding otherwise
24 what was going on in the cases at the particular time
25 of the entry.

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1 Patents."

2 Q Do you know which case number is reflected by the
3 bills designated "RE: Cell Phone Patents"?

4 A My -- I would -- I would expect that this would be
5 the internal Microsoft ITC 744 matter, is what I
6 would call it. And it would be named something
7 similar to that.

8 There may have been an evolution of name for it,
9 but I think that's -- that's what I expect that this
10 one is.

11 Q Okay. And the ITC 744 matter, that was one initiated
12 by Microsoft against Motorola; correct?

13 A That's correct. And that's also the umbrella matter
14 for which, in excess of a year, Sidley was billing
15 all of their time to on Microsoft/Motorola matters
16 regardless of the court it was in or who filed the
17 case.

18 Q Okay. Can I ask you if there -- was there something
19 specific that you saw in Exhibit 11 that made you
20 think that this relates to the 744 matter?

21 A Let's see.

22 Well, the December 22, 2010, was a big clue,
23 because that's really early and that's definitely
24 within the first year. And so that -- that certainly
25 was a big clue for me.

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1 allocation for that particular entry and it's
2 indicated in yellow.

3 Q And so for that particular entry, I think -- are you
4 looking at one of the ones on November 22nd, 2010?

5 A Right.

6 Q So we'll take the very first one for JL Secord.

7 Am I understanding you correctly that Microsoft
8 is going to be seeking to recover 80 percent of
9 the .5 hours that Mr. or Ms. Secord billed on that
10 particular task?

11 A Correct.

12 Q So if you could tell me how -- how the various
13 different percentages reflected in the color
14 coding -- how Microsoft got to each one.

15 A Yeah. There -- there are certainly some broad
16 categories. I think the broadest one is probably,
17 you know, the yellow one that -- that reflects the --
18 something that was done that was spread across all
19 five patents and, therefore, is allocated for, you
20 know, 80 percent, because there's four out of five
21 are standard-essential patents.

22 And so you'll probably see a lot of yellow in
23 here. I haven't studied it to see that, but that's
24 my best guess.

25 And then at a point in time where one of

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1 Motorola's patents would be essentially withdrawn, at
2 the point where Motorola filed a motion to terminate
3 in the ITC as to a particular patent or patents, then
4 it's obviously no longer in play. So after the point
5 of the motion to terminate by Motorola as to that
6 patent, then the allocation would change.

7 And I think there were two instances where they
8 dropped patents, and they dropped two each time. So
9 that would affect, again, an allocation for a general
10 activity that was spread across all patents at issue.
11 But if it occurred -- if it occurred after the date,
12 for example, that the -- a motion to terminate had
13 been filed by Motorola as to those patents, then
14 those would be off the table and it would change the
15 allocation.

16 And so those are some of the principles.

17 Now, some -- some of the allocations could be
18 much more fact-specific based on a particular time
19 entry, because if one could tell from the particular
20 time entry that, you know, it related to, you know, a
21 more refined allocation, if the entry was such that
22 it allowed you to allocate with a better fine point
23 than four to one, then that finer allocation would be
24 applied.

25 Q But if the entry did not have the detail that would

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1 allow you to make that finer allocation, did
2 Microsoft basically apply a general percentage rule
3 based on the patents in play at that time in the
4 case?

5 A One of two things would happen. It would either be
6 thrown out and not requested recovery at all. If --
7 if there wasn't enough information from the entry to
8 determine, then it would just be thrown out.

9 If the entry reflected, you know -- it was
10 clearly, for example, on the ITC 752 case, if it was
11 clearly an activity that, you know, could have
12 applied across the board to all patents, then, yes,
13 you apply the general rule.

14 Q Now, who -- who actually went through and did all the
15 allocations?

16 A For Sidley, I believe Ellen Robbins did.

17 Q Poor Ellen, all by herself?

18 A That's my understanding.

19 MS. ROBERTS: Sounds like fun.

20 MS. ROBBINS: True.

21 Q (By Ms. Roberts) Okay. And --

22 MS. ROBBINS: Let's repeat that
23 "poor Ellen" part again a little louder, to make
24 sure...

25 Q (By Ms. Roberts) So Ellen did the allocations.

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1 Who determined the -- I guess, the methodology of
2 using the percentages based on the number of patents
3 in play in the particular case at the time?

4 A I'd say I dictated the methodology.

5 Q Okay. What documents did Microsoft review and rely
6 on to determine how to make specific allocations in
7 the invoices?

8 A You know, I -- the invoices themselves, I'm sure,
9 were the principal source. And, you know, beyond the
10 invoices themselves and determining a -- sort of a
11 historical timeline date -- for example, when did
12 Motorola file its motion to terminate as to a
13 particular patent -- I'm not aware of anything else.
14 But it's possible something else was looked at, but
15 I'm not aware of it.

16 Q Was an -- was an actual timeline created for the
17 purposes of this allocation process, to determine
18 what you just described?

19 A I don't know if a timeline was created or simply was
20 done from memory of the dates or -- you know, I don't
21 know either way.

22 Q Okay. Did Microsoft -- Microsoft speak to anyone in
23 connection with preparing the allocations?

24 A In actually executing the allocations, I don't know
25 that Ms. Robbins spoke to anyone about it, in

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1 actually executing them. I don't know.

2 Q Did Microsoft speak to any of the specific
3 timekeepers on the invoices to ask them about certain
4 entries?

5 A I don't know one way or the other.

6 Q Do you know if there are any -- well, let's see.

7 Did any of the timekeepers at Sidley -- well, let
8 me start over.

9 Earlier today, you indicated that you thought
10 there were sort of buckets of people at Sidley that
11 might have worked on H.264 patents and 802.11 patents
12 and then, you know, perhaps some of the counterclaim
13 patents.

14 Is that right?

15 A There certainly were, you know, groups, possibly some
16 overlap, but -- but largely segregated between, you
17 know, folks that were working on H.264 and folks that
18 were working on 802.11. There are probably core
19 groups that spent a lot of time doing those things.

20 They also did other things in the cases, but as
21 to those two topics, I do remember, you know, there
22 were sort of core teams addressing those.

23 Q Okay. But then there was also overlap between those
24 core members and other tasks on the cases; right?

25 A Yes.

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1 allocated?

2 A I'm unaware of whether or not that happened.

3 Q How long did the process of preparing the
4 allocations, the color-coded allocations -- examples
5 of which are in Exhibits 9, 10, and 11 -- take?

6 A As best as I can recall, weeks. I couldn't pin it
7 down better than that.

8 When I say "weeks," I don't just mean two. I
9 think quite some -- quite some time, but I can't -- I
10 can't pin it down better than that.

11 Four to eight weeks, something around that. It's
12 hard for me to pin it down. Seems like a lot of time
13 was spent doing it.

14 Q Do you recall when the process of creating the
15 allocations started?

16 A No, I don't recall exactly. Since it just concluded,
17 you know, recently, I'd suspect within the last two
18 months.

19 Q That it started?

20 A Yeah, I mean, that's -- but -- you know, but again,
21 there may be something that would help me, you know,
22 figure that out. Probably -- maybe some new invoices
23 that show it.

24 Q The Court held a hearing on March 14th, in which he
25 set a schedule for the case.

EXHIBIT D

THE HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,
Plaintiff,
vs.
MOTOROLA, INC., et al.,
Defendants.
MOTOROLA MOBILITY LLC, et al.,
Plaintiffs,
vs.
MICROSOFT CORPORATION,
Defendants.

Case No. C10-1823-JLR

DEFENDANT MOTOROLA
MOBILITY, INC.'S FIRST SET OF
INTERROGATORIES AND
REQUESTS FOR PRODUCTION TO
PLAINTIFF MICROSOFT
CORPORATION AND
**MICROSOFT CORPORATION'S
APRIL 3, 2013 SUPPLEMENTAL
OBJECTIONS, ANSWERS, AND
RESPONSES THERETO**

**MICROSOFT CORPORATION'S *APRIL 3, 2013 SUPPLEMENTAL* OBJECTIONS,
ANSWERS, AND RESPONSES TO MOTOROLA MOBILITY, INC.'S
FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION**

Pursuant to Fed. R. Civ. P. 26, 33, and 34 and all applicable Local Rules, Microsoft Corporation ("Microsoft") hereby submits the following answers, responses, and objections to Motorola Mobility, Inc.'s ("Defendant's" or "Motorola's") First Set of Interrogatories and Requests for Production ("Discovery Requests").

**MICROSOFT CORPORATION'S *APRIL 3, 2013 SUPPLEMENTAL* OBJECTIONS,
ANSWERS, AND RESPONSES - 1**

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INTERROGATORY NO. 3: State the factual basis for any contention underlying

Microsoft's claim that Motorola's October 21, 2010 and October 29, 2010 Letter constituted a breach or other violation of a commitment to license patents on reasonable and non-discriminatory terms.

ANSWER: Microsoft incorporates by reference each of its General Objections as though set forth herein. Microsoft further objects that this is a premature contention interrogatory. Microsoft is not obligated to respond to premature contention interrogatories until the parties have substantially completed discovery.

Subject to and without waiving these objections, Microsoft answers that, in willful disregard of the commitments Motorola made to IEEE and the ITU-T, Motorola has refused to extend to Microsoft a license consistent with Motorola's promises for any of Motorola's allegedly "essential" patents. Instead, Motorola is demanding royalty payments that are wholly disproportionate to the royalty that its patents should command under any reasonable calculus. Motorola has discriminatorily chosen Microsoft's Xbox product line and other multi-function, many-featured products and software, such as Windows 7 and Windows Phone 7 and products incorporating Microsoft software, for the purpose of extracting unreasonable royalties from Microsoft that are inconsistent with Motorola's obligation to offer licenses for the relevant patents on RAND terms and conditions.

In further response, Microsoft states as follows:

Motorola's October 21, 2010 Letter

By letter to Microsoft, dated October 21, 2010, Kirk Dailey, Motorola's Corporate Vice President Intellectual Property, offered to license "Motorola's portfolio of patents and pending applications having claims that may be or become Essential Patent Claims (as defined in section 6.1 of the IEEE bylaws) for a compliant implementation of the IEEE 802.11 Standards." Motorola offered to license the relevant patents under terms and conditions that

**MICROSOFT CORPORATION'S APRIL 3,
2013 SUPPLEMENTAL OBJECTIONS,
ANSWERS, AND RESPONSES - 15**

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1 included a "royalty of 2.25% per unit for each 802.11 complaint product[.]" Motorola stated
 2 that the royalty "is calculated based on the price of the end product (e.g., each Xbox 360
 3 product) and not on component software."

4 The cost of the chips and associated components that provide wireless connectivity for
 5 Xbox 360 consoles is a small fraction of the overall cost of the device. Moreover, Microsoft
 6 sells its Xbox 360 consoles at a number of prices. Each console includes approximately the
 7 same chips and associated components for wireless connectivity, providing the same level of
 8 relevant functionality. Motorola thus seeks a royalty on components of Xbox 360 that is
 9 disproportionate to the value and contribution of its purportedly "essential" patents and has
 10 declined to offer a license to its purported "essential" patents unless it receives exorbitant and
 11 discriminatory royalty payments to which it is not entitled. On information and belief,
 12 Motorola has not previously entered into a license agreement for its purported "essential"
 13 patents that is comparable to the demand made of Microsoft. Motorola has thereby refused to
 14 offer to license the patents at a reasonable rate, with reasonable terms, under conditions that are
 15 demonstrably free of any unfair discrimination.

16 The royalty demanded by Motorola falls well outside the boundaries of a reasonable
 17 and non-discriminatory royalty and therefore violates the commitment Motorola made to the
 18 IEEE and its members.

19 Participants in IEEE-SA standards setting efforts, including those directed to WLAN
 20 technology, were subject to the IEEE-SA Standard Board Bylaws concerning the submission
 21 of Letters of Assurance related to patent claims deemed "essential" by a submitting party.
 22 Clause 6 of those Bylaws (which was revised slightly over the years) generally provides in
 23 pertinent part:

24 A Letter of Assurance shall be either:
 25

1 a) A general disclaimer to the effect that the submitter without conditions will
2 not enforce any present or future Essential Patent Claims against any person or
entity making, using, selling, offering to sell, importing, distributing, or
implementing a compliant implementation of the standard; or

3 b) A statement that a license for a compliant implementation of the standard
4 will be made available to an unrestricted number of applicants on a worldwide
5 basis without compensation or under reasonable rates, with reasonable terms
and conditions that are demonstrably free of any unfair discrimination.

6 Motorola openly and publicly submitted Letters of Assurance pursuant to Clause 6 of
7 the IEEE-SA Standards Board Bylaws that it would offer to license any of its patents essential
8 to the applicable WLAN standard(s) to any entity under reasonable rates on a non-
9 discriminatory basis. IEEE-SA and its participants and affiliates relied on Motorola's promises
10 in developing, adopting and implementing IEEE-SA technical standards. These standards are
11 now implemented worldwide in a variety of electronic devices that have become
12 commonplace.

13 Microsoft invested substantial resources in developing and marketing products in
14 compliance with these standards, relying on the assurances of participating patent holders –
15 including Motorola – that any essential patents held by such patent holders would be available
16 for licensing by implementers of the standards on such terms.

17 By way of non-limiting example, each Xbox device includes substantial software and
18 many computer chips and modules that perform various functions, including enabling Xbox's
19 core functionality as a video gaming machine. Of those, the Xbox console includes one – an
20 interface provided to Microsoft by third-parties – that allows consumers optionally to connect
21 an Xbox to the Internet using a WLAN connection.

22 The third-party WLAN interface does not enable any of Xbox's core video gaming
23 functionality. In addition, Microsoft allows consumers an alternative, wired method to connect
24 to the Internet. This alternative method does not require use of any WLAN technology.
25

1 On information and belief, Motorola obtained rights to several of the WLAN patents it
 2 has represented as “essential” through its recent acquisition of Symbol Technologies, Inc.
 3 (“Symbol”).

4 Prior to the releases of the 802.11 protocols, Motorola and Symbol submitted Letters of
 5 Assurance to the IEEE pursuant to Clause 6 of the IEEE-SA Standards Board Bylaws with
 6 respect to those protocols, guaranteeing that any “essential” patents would be licensed under
 7 reasonable and non-discriminatory terms and conditions. Both Motorola’s and Symbol’s
 8 Letters of Assurance apply to any “essential” patents they then held as well as any other
 9 “essential” patents they subsequently obtained.

10 In reliance on these letters of assurance, IEEE released the 802.11 standard and various
 11 amendments to that standard that Motorola asserts incorporated Motorola’s and Symbol’s
 12 patented technology. On information and belief, once Motorola and Symbol disclosed that
 13 they likely held essential patents, absent a licensing commitment from them to the effect that
 14 they would offer licenses to “essential” patents on reasonable and non-discriminatory terms
 15 and conditions, the relevant IEEE working groups would have either revised the standards,
 16 employing alternative technologies instead, stopped working on the protocols or taken other
 17 actions.

18 In submitting its Letter of Assurance pursuant to the applicable IEEE IPR policy,
 19 Motorola entered into an actual or implied contract with IEEE, for the benefit of IEEE
 20 members and any entity that implements the 802.11 standard. Motorola is bound by its
 21 agreements to offer licenses consistent with the referenced IEEE bylaws.

22 Similarly, Symbol, in submitting its Letter of Assurance pursuant to the applicable
 23 IEEE IPR policy, entered into an actual or implied contract with IEEE, for the benefit of IEEE
 24 members and any other entity that implements the 802.11 standard, and Motorola is bound by
 25 that commitment.

1 Motorola broke its promise to IEEE-SA and its members and affiliates by refusing to
 2 offer to Microsoft a license that is consistent with Motorola's Letter(s) of Assurance and
 3 Clause 6 of the IEEE-SA Standards Board Bylaws, instead demanding royalties that are
 4 excessive and discriminatory.

5 Motorola's October 29, 2010 Letter

6 By letter to Microsoft, dated October 29, 2010, Kirk Dailey, Motorola's Corporate Vice
 7 President Intellectual Property, offered to license "Motorola's portfolio of patents and pending
 8 applications covering the subject matter of ITU-T Recommendation H.264[.]" Motorola
 9 offered to license the relevant patents under terms and conditions that included a "royalty of
 10 2.25% per unit for each H.264 complaint product[.]" Motorola stated that the royalty "is
 11 calculated based on the price of the end product (e.g., each Xbox 360 product, each PC/laptop,
 12 each smartphone, etc.) and not on component software (e.g., Xbox 360 system software,
 13 Windows 7 software, Windows Phone 7 software, etc.)."

14 The cost of such component software and any inter-related hardware is a small fraction
 15 of the overall cost of the listed devices. Moreover, Microsoft sells products having H.264
 16 related capabilities at a wide range of prices, without regard to the significance of such H.264
 17 related capabilities to the primary or expected use of the products. Motorola thus seeks a
 18 royalty on software and hardware components of Xbox 360 and other devices that are
 19 unrelated to its identified patents and has declined to offer a license unless it receives
 20 exorbitant royalty payments to which it is not entitled. On information and belief, Motorola
 21 has not previously entered into a license agreement for its identified patents that is comparable
 22 to the demand made of Microsoft. Motorola has thereby refused to offer to license the patents
 23 at a reasonable rate, with reasonable terms, on a non-discriminatory basis.

1 The royalty demanded by Motorola falls well outside the boundaries of a reasonable
2 and non-discriminatory royalty and therefore violates the commitment Motorola made to the
3 ITU and its members.

4 Participants in ITU-T standards setting efforts, including those directed to H.264
5 technology, were subject to the ITU-T Common Patent Policy concerning the submission of
6 Patent Statement and Licensing Declarations related to patents identified by a submitting party.
7 The ITU-T Common Patent Policy generally provides, in pertinent part, that a patent holder's
8 statement may declare that:

9 (2.1) The patent holder is willing to negotiate licenses free of charge with other
10 parties on a non-discriminatory basis on reasonable terms and conditions.

11 (2.2) The patent holder is willing to negotiate licenses with other parties on a
12 non-discriminatory basis on reasonable terms and conditions.

13 Motorola openly and publicly submitted Patent Statement and Licensing Declarations
14 pursuant to the ITU-T's Common Patent Policy that it would offer to license any of its patents
15 essential for the relevant H.264 Recommendation(s) to any entity under reasonable rates on a
16 non-discriminatory basis. The ITU-T and its participants and affiliates relied on Motorola's
17 promises in developing, adopting and implementing the ITU-T H.264 Recommendations (or
18 standards). These standards are now implemented worldwide in a variety of electronic devices
19 and software that have become commonplace. Microsoft invested substantial resources in
20 developing and marketing products in compliance with these standards, relying on the
21 assurances of participating patent holders – including Motorola – that any “essential” patents
22 held by such patent holders would be available for licensing by implementers of the standards
23 on such terms.

24 In submitting its Patent Statement and Licensing Declarations pursuant to the
25 applicable ITU-T policy, Motorola entered into an actual or implied contract with the ITU-T,

1 for the benefit of ITU-T members and any entity that implements the H.264 technologies.
 2 Motorola is bound by its agreements to offer licenses consistent with the referenced ITU-T
 3 Common Patent Policy.

4 Microsoft has participated in the development of the 802.11 and H.264 standards.
 5 Microsoft and other companies participating in the development of these standards relied on
 6 Motorola's commitments to ensure that the royalties Motorola would seek would conform to
 7 the promises made by Motorola.

8 In reliance on the integrity of the SDO process and the commitments made by Motorola
 9 and others regarding 802.11 patents they deem "essential," Microsoft began providing its Xbox
 10 video game consoles with WLAN connectivity. By way of example, Microsoft purchased and
 11 incorporated into its Xbox 360 video game consoles third-party-manufactured interfaces that
 12 provide Xbox 360 devices with WLAN connectivity. Microsoft made its decision to provide
 13 its Xbox video game consoles with WLAN connectivity in reliance on, and under the
 14 assumption that, it and/or any third party supplier could avoid patent litigation and take a
 15 license to "essential" patents that Motorola, or any other company submitting a Letter of
 16 Assurance, holds with regard to the WLAN standard under IEEE's well publicized IPR policy.

17 Microsoft and other manufacturers of WLAN-compliant devices necessarily relied on
 18 the assurances of participating patent holders – including Motorola – that any "essential"
 19 patents held by such patent holders would be available for licensing by implementers of the
 20 standards on such terms.

21 Correspondingly, in reliance on the integrity of the SDO process and specifically the
 22 commitments made by Motorola and others regarding patents related to H.264 technologies,
 23 Microsoft began providing its H.264 technology capability in its Xbox video game consoles.
 24 Microsoft made its decision to provide its Xbox video game consoles with H.264 technology in
 25 reliance on, and under the assumption that, it and/or any third party supplier could avoid patent

1 litigation and take a license to any “essential” patents held by Motorola, or any other company
 2 submitting a Patent Statement and Licensing Declaration, under the ITU-T’s well-publicized
 3 IPR policy.

4 Microsoft made similar investments in other fields, including Windows 7 and Windows
 5 Phone 7, based upon Motorola’s representations in relation to the H.264 technology standards.
 6 Microsoft and other manufacturers and suppliers of H.264 compliant technology necessarily
 7 relied on the commitments of Motorola and others to license their “essential” patents under
 8 these terms.

9 By way of non-limiting example, each personal computer running Windows 7 includes
 10 substantial software and many computer chips and modules that perform various functions,
 11 including those related to the general operation of a computing device. Of those, each personal
 12 computer includes just a portion directed to H.264 technologies.

13 By way of further non-limiting example, each smartphone running Windows Phone 7
 14 includes substantial software and many computer chips and modules that perform various
 15 functions, including those related to the general and particularized operation of a smartphone
 16 independent of H.264 technology. Of those, each smartphone includes just a portion directed
 17 to H.264 technologies.

18 Motorola broke its promise to the ITU-T and its members and affiliates by refusing to
 19 offer to Microsoft a license that is consistent with Motorola’s Patent Statement and Licensing
 20 Declaration(s) and the Common Patent Policy of the ITU-T, instead demanding royalties that
 21 are excessive and discriminatory.

22 **SUPPLEMENTAL RESPONSE OF APRIL 3, 2013:**

23 Motorola committed to license its standard essential patents on RAND terms. This
 24 meant that Motorola had to make a license available to any implementer of the standards.
 25

**MICROSOFT CORPORATION’S APRIL 3,
 2013 SUPPLEMENTAL OBJECTIONS,
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1 Offers made to prospective licensees had to be commercially reasonable. Motorola could not
 2 seek injunctive relief instead of entering into a license on RAND terms, especially in
 3 circumstances where its license offers were not commercially reasonable. In addition,
 4 Motorola was subject to a duty of good faith and fair dealing in licensing and offering to
 5 license its standard essential patents.

6 As a consequence of these contractual obligations undertaken by Motorola, Motorola
 7 breached its RAND commitments in at least the following respects. Motorola's breach is not
 8 limited to the October 2010 demand letters.

- 9 • Motorola's October 2010 demand letters did not offer licenses to Microsoft on
 10 RAND terms, and, to the contrary, were commercially unreasonable and
 11 facially outrageous; Motorola improperly sought the holdup value of its patents
 12 rather than their RAND value and improperly sought a royalty on the entire
 market value of products, which included many components and features for
 which Motorola was not entitled to any compensation.
- 13 • Motorola improperly sought injunctive relief in the ITC, the district courts and
 14 Germany instead of honoring its commitment to make licenses available on
 15 RAND terms. Repeated judicial and administrative rulings specific to Motorola
 16 have confirmed that its pursuit of injunctive relief was improper, including
 17 Judge Posner's June 22, 2012 determination that Motorola could not obtain
 18 injunctive relief on its 802.11 standard-essential patents; the Court's November
 19 29, 2012 order enjoining Motorola from seeking injunctive relief against
 20 Microsoft with respect to Motorola's H.264 and 802.11 standard essential patent
 21 portfolios; and the January 3, 2013 FTC consent order prohibiting Google and
 22 Motorola from obtaining or enforcing injunctive relief on standard-essential
 patents during the pendency of district court's resolution of a request for a
 RAND determination. As the FTC explained, the consent order barring
 Motorola from pursuing injunctive relief targeted "breaches by Google and its
 subsidiary [Motorola] of Motorola's commitments to license standard-essential
 patents ('SEPs') on terms that are fair, reasonable and non-discriminatory
 ('FRAND')." Statement of the Federal Trade Commission, *In the Matter of*
Google Inc., FTC File No. 121-0120 (Jan. 3, 2013).
- 23 • Motorola declined to offer a license to Microsoft's chip supplier Marvell (which
 24 requested a license for the specific benefit of Microsoft) on RAND terms that
 25 would cover product shipped to Microsoft and acted in a way that was both
 unreasonable and discriminatory.

- 1 • Once Motorola was acquired by Google and Microsoft had a right to a license to
2 Motorola's H.264 standard essential patents by virtue of Google's participation
3 in the MPEG-LA AVC pool, Motorola refused to grant a license on those terms,
4 which would have complied with the RAND commitment.
- 5 • Motorola violated the covenant of good faith and fair dealing by reason of all of
6 the actions recited above, whether considered separately or collectively, on an
7 objective standard.
- 8 • Motorola also violated the covenant of good faith and fair dealing because it
9 knew it was acting, and intended to act, inconsistently with the covenant of
10 good faith and fair dealing by virtue of the actions recited above and the
11 following additional indicia of intent:
 - 12 ○ Motorola's objective from the beginning was to secure crippling
13 injunctive relief in some forum so that Microsoft would be deterred from
14 seeking compensation for Motorola's infringement of Microsoft's non
15 standard essential patents in Motorola's Android phones. Motorola's
16 demand letters in October 2010 were intended to set forth offers that it
17 knew no reasonable company would accept.
 - 18 ○ In furtherance of the pursuit of injunctive relief, Motorola stated that the
19 offers in the demand letters would remain open for only 20 days.
 - 20 ○ At the time that the demand letters were sent, Motorola had never
21 entered into a license with anyone for its H.264 or 802.11 standard
22 essential patents that was remotely comparable to the terms of the
23 demand letter
 - 24 ○ Motorola understood the financial implications of the demand letter,
25 including that it would be compensated for components and features as
to which it had no patents.
 - Motorola sought injunctions knowing that the terms in its October 2010
demand letters would be unacceptable to Microsoft and would not be
accepted.
 - Motorola demanded that Marvell pay royalties on the end product sales
of its downstream customers even though no one had ever agreed to pay
royalties to Motorola on this basis.
 - Motorola discriminated against Marvell and Microsoft by excluding
chips sold to Microsoft from the license offered to Marvell.

- Motorola in league with its parent company Google evaded the requirements of the MPEG-LA AVC pool agreement.

INTERROGATORY NO. 4: State the factual basis for any contention that Microsoft suffered damage to its business or property, or was irreparably injured, by reason of the October 21, 2010 Letter and/or October 29, 2010 Letter.

ANSWER: Microsoft incorporates by reference each of its General Objections as though set forth herein. Microsoft further objects that this is a premature contention interrogatory. Microsoft is not obligated to respond to premature contention interrogatories until the parties have substantially completed discovery.

Subject to and without waiving the foregoing objections, Microsoft answers that it has suffered damage because, and to the extent that, Microsoft and its employees have been forced to expend a significant amount of time, money and resources on issues relating to this dispute and the Motorola Patent Actions. But for Motorola's failure to offer Microsoft licenses to those patents Motorola alleges are "essential" to implementation of the H.264 and 802.11 standards on RAND terms and conditions, Microsoft would not have incurred these costs, expenses or losses of productivity. It will be difficult, if not impossible, for Microsoft to recoup this lost time and productivity, and Microsoft's losses will continue until Motorola complies with the contractual commitments it made to the IEEE, ITU, and their members. Microsoft has also been damaged as a result of having to defend the Motorola Patent Actions, in which Motorola seeks to enjoin or exclude Microsoft from practicing, or importing products that practice, the 802.11 and H.264 standards. Further, Microsoft may also suffer imminent loss of profits, loss of customers and potential customers, and loss of goodwill and product image as a result of Motorola's refusal to offer licenses to the relevant technologies on fair and reasonable terms.

1 license had been available at that time, Microsoft would not have incurred any further damage
2 by failure of Motorola to make available a license on RAND terms for its 802.11 patents.

3 On May 22, 2012, Motorola was acquired by Google, and Microsoft was entitled to a
4 license to Motorola's H.264 patents under the terms of Google's license agreement with
5 MPEG-LA on terms set forth in the pool license. Motorola failed to make available a license
6 on those terms. If the license had been available at that time, Microsoft would not have
7 incurred any further damage by failure of Motorola to make available a license on RAND
8 terms for its H.264 patents.

9 SUPPLEMENTAL OBJECTIONS, ANSWERS, AND RESPONSES DATED this 3rd
10 day of April, 2013.

11 DATED this 3rd day of April, 2012.

12 CALFO HARRIGAN LEYH & EAKES LLP

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MICROSOFT CORPORATION'S APRIL 3,
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